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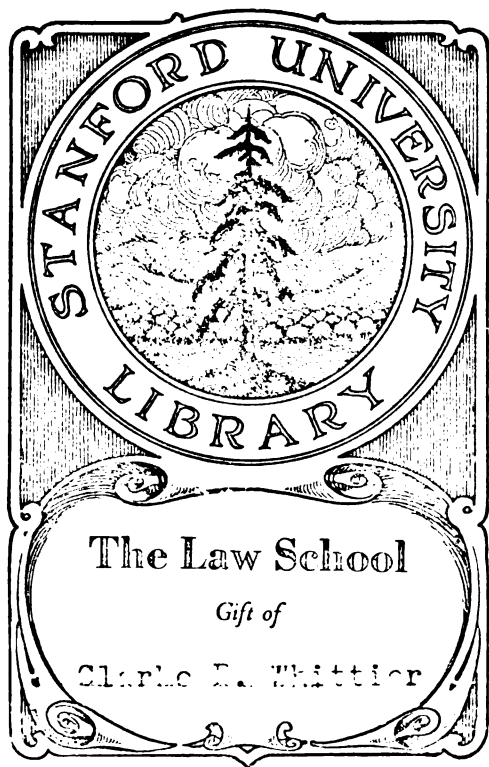
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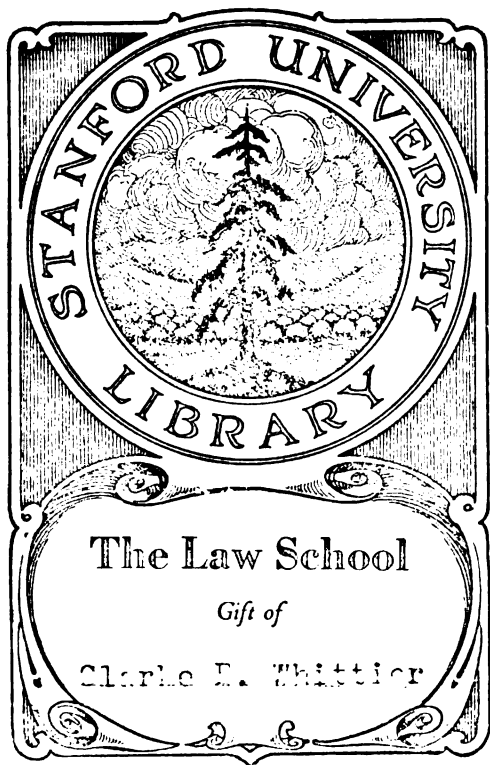
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DIGEST

OR THE LAW RELATIVE TO

PLEADING AND EVIDENCE *Mr. Higley*

IN

CIVIL ACTIONS.

By JOHN FREDERICK ARCHBOLD, Esq.
BARRISTER AT LAW.

Second American, from the last London Edition.

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TO THE PRESENT EDITION.

THE alterations recently made in pleading in civil actions, were, I believe, long in contemplation ; at least, it was generally rumoured that such alterations were intended, a long time previously to the rules upon the subject being actually made. This will readily account for my not having presented to the Profession a new edition of the present Work, during the many years it has been out of print ; I could not think of taxing the Profession with a work, which the intended New Rules, at that time daily expected, might possibly render nearly, if not altogether, useless. And even now, that the Rules of Pleading have been some time published, I cannot entirely satisfy myself that I am not premature in publishing this edition ; I fear many will think that there have not as yet been a sufficient number of decisions upon the application of the General Rules of Pleading to particular cases, to warrant the publication of any work upon Pleading and Evidence. But my friends at the Bar have so frequently expressed to me their desire for the publication of this Volume, imperfect as it necessarily must be, that I conceive myself bound to conform to their wishes upon the subject, and to publish it. If I were to defer the publication until, by decisions as to the application of the New Rules to particular cases, our system of pleading should be deemed complete, I fear I should not be able to publish the Work for many years. I beg to mention that the present Work treats only of Pleading and Evidence generally ; but it will be followed by another, treating of Pleading and Evidence in the different personal actions, and in Ejectment. For the reason above mentioned, however, I must be

allowed a reasonable time to collect further decisions upon the subject, before I venture to publish it. Upon a system of pleading, nearly altogether new, which has yet to be moulded into form and consistency by decisions of the Courts, I am anxious to obtrude my opinion and judgment upon the Profession as sparingly as possible; I am quite aware of the responsibility I incur by venturing my opinion publicly upon points not yet decided; but although I shall eventually be obliged to do this, in many instances, in the Work which I have now announced, I am anxious, by a little delay, to lessen the occasions for doing so as much as possible.

For the contents of the Work, and the manner in which I have done it, I beg to refer the reader generally to the Preface to the First Edition. I have omitted, however, such part of the former edition as related to the Pleading, Evidence, and Practice in real actions; the learning upon those subjects is now nearly useless, the Writ of Right and other real actions being abolished, with the exception of the Writ of Right of Dower, and *Dower unde nihil habet*, which scarcely ever occur in Practice. Of the mixed actions, also, Ejectment, and *Quare Impedit* alone remain; of Ejectment, probably also of *Quare Impedit* I shall treat in the Work which I have above announced. To the part of the work retained, comprising the law relative to Pleading and Evidence generally, I have added largely, and have endeavoured to render it as complete as possible. Engrafting the New Rules upon the old system, so as to render the whole consistent and uniform, was a task of no trifling difficulty. Even adding to the work the cases decided, and statutes enacted, since the publication of the former edition, was a labour of some difficulty and great nicety. But these difficulties I have cheerfully encountered, in the hopes of procuring for this edition the same kind and favourable reception the former edition experienced from the Profession.

J. F. A.

PREFACE

TO THE FIRST EDITION.

IN a little work, recently published by me, upon the Practice of the Court of King's Bench, I mentioned in the Preface that I had compiled it from materials I had collected for a work of much greater extent. The work to which I then alluded, treated of the remedy by action for all injuries to the person, property and character of individuals, and comprised the Practice of the Courts of King's Bench, Common Pleas and Exchequer; Pleading and Evidence generally; Pleading and Evidence in the different actions particularly; and Pleading and Evidence in actions by and against particular persons: the whole forming, not indeed a treatise, but a very extensive collection of authorities upon Pleading, Evidence, and Practice, in real, personal, and mixed actions, arranged in a simple and lucid order. As soon however as I had come to the resolution of giving this Work to the Public, I was persuaded that I should render it more extensively useful, by dividing it according to the different subjects of which it treated, and publishing each part separately. I accordingly published the Practice of the Court of King's Bench in personal actions and ejectment; and the very flattering reception that little Work met with, has induced me to proceed. That part of the original Work, which related to Pleading and Evidence, forms the subject of the present volumes; the Practice of the Court of Common Pleas, I may probably be induced to publish at a future opportunity.

Having given this brief account of the origin of this little Work, I shall proceed to apprise the Reader of what he is to expect in it. The title "Pleader," and one or two other

titles in the Digest of Lord Chief Baron Comyns, and the Treatise upon Evidence by Lord Chief Baron Gilbert, form the ground-work of the whole. Upon these I have ingrafted the most valuable parts of the *Doctrina Placitandi*, Mr. Serjeant William's notes to his edition of Saunders's Reports, together with very considerable portions of original matter, calculated to render the work more useful in practice; and I have thrown the whole into a new form, which has had the effect of simplifying some very complex subjects, and of rendering the work much more ready of reference. In re-arranging these materials I have taken care to keep the matter, borrowed from Comyns' Digest, distinct from the original matter which I have myself added, in order that I might obtain for this little work the credit for accuracy so justly due to the work of Lord Chief Baron Comyns; indeed so strict have I been in this respect, that I have retained the language of the Digest, although at the expense of creating a considerable unevenness of style in the work altogether. The reader will therefore find the passages from Comyns' Digest immediately followed by references to that Work; and where any original matter precedes them in the same paragraph, an asterisk (thus*) marks where the original matter ends, and where the passage from the Digest commences. Also, where any original matter is introduced in the midst of a passage from the Digest, it is uniformly included within brackets. I have not been so fortunate with Gilbert's Evidence; the diffuse style of that Work rendering it impossible to amalgamate it with the concise style of the Digest. But I can answer for the substance of it being faithfully given.

The manner in which the Work is arranged, will not, I should hope, be found very defective. The 1st Book treats of Pleading and Evidence, generally; the 2d, of Pleading, Evidence, and the Proceedings in Real Actions; the 3d, of Pleading and Evidence in Mixed Actions; the 4th, of Pleading and Evidence in Personal Actions; and the 5th, of Pleading and Evidence in Actions by and against particular per-

sons.* The whole is prefaced with an Introduction, stating shortly the nature of the remedies by action, assigned by law for injuries to the person, property or character of individuals; the time limited by law for the injured party to avail himself of such remedies: and the persons who must be made parties to the action. Each Volume of the Work concludes with a kind of recapitulation of the principles laid down in it, stating, by way of question, the defects most likely to occur in pleading, &c. and also stating the mode of taking advantage of them, whether by plea in abatement, demurrer, motion in arrest of judgment, writ of error, or by objection at the trial. This, I think, will be found useful, particularly to the younger part of the profession; the constant use of it will give them the habit of critically examining their own pleadings, as well as those of others; of guarding against defects in the one, and of taking advantage of those in the other. I compiled it originally for the use of my Pupils; and I had reason to be satisfied of its efficacy.

The style in which the Work is written will be found plain, simple, and unadorned; the matter compressed into the smallest possible compass consistent with perspicuity; and nothing redundant or irrelevant admitted into it. Also the size of the Work, and the unassuming form under which it is published, may probably assist in procuring for it a favourable reception with the Profession and the Public.

J. F. A.

* This arrangement is now altered. The First Book, treating of Pleading and Evidence generally, is the work now published. The Second Book, above mentioned, treating of Pleading and Evidence in Real Actions, is altogether omitted; real actions, with the exception of the writ of right of Dower, and Dower *unde nihil habet*, having been abolished by a recent statute. Pleading and Evidence in personal actions, and in Ejectment and *Quare Impedit* (the only mixed actions which now remain,) shall be fully treated of in a separate work, now preparing for publication.—*Note to the present Edition.*



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EXPLANATION OF REFERENCES.

Bro. Brooke's Abridgment.

Bro. Ent. Brown's Entries.

Bro. R. Brownlow's Redivivus.

Bro. V. M. Brown's Vade Mecum.

Brownl. Brownlow's Reports.

Brownl. E. Brownlow's Entries.

Com. Dig. Comyn's Digest, cited by the titles, and not by the volume and page.

Dal. Dalis. Dallison's Reports.

Dan. Danv. Danver's Abridgment.

F. N. B. Fitzherbert's Natura Brevium, cited (with a few exceptions) according to the original paging.

Fitz. Fitzherbert's Abridgment.

Godb. Godbolt's Reports.

Lit. Littleton's Reports.

Lit § Littleton's Tenures, cited by the section.

M. & S. Maule and Selwyn's Reports.

Mod. Ca. 6th Modern Reports.

Pl. or Pl. Com. or Plowd. Plowden's Commentaries.

Rast. Ent. Rastal's Entries.

Reg. Registrum Brevium.

Rob. Robinson's Entries.

Rol. or Rol. Rep. Rolle's Reports.

Rol. 200. l. 25. Rolle's Abridgment, so cited.

Run. Runnington on Ejectment.

Th. D. Thelol's Digest.

Tho. or Tho. Ent. Thompson's Entries.

Vad. M. Brown's Vade Mecum.

Vid. Ent. Vidian's Entries.

Win. Ent. Winch's Entries.

Year Books, cited thus: 1 H. 7, 13, usually according to the paging of Maynard's Edition.

*. *. The other references used in the course of the Work, are such as are usually adopted.

MEMORANDA.

1. It has been decided that the Rule H. 4 W. 4, I. s. 2, (post, p. 168,) by which it is ordered that "in a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment,"—extends to a plea pleaded to one of several counts in a declaration; and that the only instance in which the *actionem non* and prayer of judgment are now requisite in a plea, is, when it is pleaded to part of a count only. *Bird v. Higginson*, 2 Ad & E. 696. And, therefore, where a plea is pleaded either to the whole declaration, or to the entire of one of several counts, the form will be the same as is described post, pp. 167. 168. But where it is pleaded to part of a count only, it must be in the form following:

"In the King's Bench.

The 5th day of July, 6 Will. 4.

S. } And for a further plea in this behalf, as to the assaulting, beating,
ats. } and ill-treating the said plaintiff, by him the said defendant, above sup-
N. } posed to have been done, the said defendant says that the said plaintiff
ought not to have or maintain his said action against him; because he says that,"
&c. "And this he the said defendant is ready to verify. Wherefore he prays
judgment, if the said plaintiff ought to have or maintain his aforesaid action
thereof against him, &c."

Replication thereto.

"In the King's Bench.

The 15th day of July, 6 Will. 4.

N. } And the said plaintiff, as to the said plea of the said defendant by him
v. } [secondly] above pleaded, as to the said several trespasses in the intro-
S. } ductory part of that plea mentioned and therein attempted to be justified,
says that he the said plaintiff, by reason of any thing by the said defendant in his
plea alleged, ought not to be barred from having and maintaining his aforesaid
action against him; because he says that," &c. "And this he the said plaintiff
is ready to verify. Wherefore he the said plaintiff prays judgment and his
damages by him sustained, by reason of the committing of the said trespasses, to
be adjudged to him, &c."

2. It has been holden that in assumpsit, where matter of excuse is pleaded, the plaintiff may reply *De injuria*. *Isaac v: Farrar*, 1 Tyr. & Gr. 281. This replication may be in the form following :

In the King's Bench.

The——day of——, 6 Will. 4.

N. } *And the said plaintiff, as to the plea of the said defendant by him*
 v. } *[secondly] above pleaded, says that the said defendant of his own wrong,*
 S. } *and without the cause by him in that plea alleged, broke his said promise in*
the said [first count of the said] declaration mentioned, in manner and form as he
the said plaintiff has in the said [first count of the said] declaration in that be-
half complained against him ; and this he the said plaintiff prays may be in-
quired of by the country, &c."



INTRODUCTION.

When a man has received an injury, and is desirous of obtaining a remedy for it in a Court of Common Law, the first thing to be considered is, whether he have the privilege of suing, and whether the person, who has injured him, is liable to be sued. Having satisfied himself of this, his next inquiry will be, what remedy by action the law has assigned for the injury he has received; and, after fixing upon the form of action he is to adopt, he must next inquire whether the time limited by law, for bringing that particular form of action, have not elapsed, and, lastly, he must ascertain who are to be made parties to the action. These preliminary inquiries shall form the subject of the present Introduction; and shall be treated of in the order above mentioned.

CHAPTER I.

WHO MAY SUE OR BE SUED.

Sec. I.—Who may or may not Sue.

The King.] The king, although chief and head of the kingdom, may sue as demandant, or plaintiff, Th. D. l. 1. c. 3. 3 Inst. 136, in a writ of escheat; Th. D. l. 1. c. 3. s. 4. 3 Inst. 136; in a writ of ward; 1 H. 4. 1. 3 Inst. 136. Th. D. l. 1. c. 3. s. 18; in a writ of right of advowson; Th. D. l. 1. c. 3. s. 3; in quare impedit; Th. D. l. 1. c. 3. s. 15, 16. 3 Inst. 136; in quare incumbravit; 3 Inst. 136; in debt; Th. D. l. 1. c. 3. s. 21. 3 Inst. 136; in trespass; 4 H. 4, 4 b. 10 H. 4, 3. Th. D. l. 1. c. 3. s. 19. F. N. B. 90. 1; in attain; 42 E. 3, 26 b. 3. Inst. 136. Th. D. l. 1. c. 3. s. 21; in deceit, to reverse a fine of lands in ancient demesne; Per Thirning, 11 H. 4, 86. Th. D. l. 1. c. 3. s. 21; in a writ of error; 22 E. 3, 21 b. 39 Ass. pl. 16. Th. D. l. 1. c. 3. s. 17; and in scire facias. 10 H. 4, 7. 3 Inst. 136. Th. D. l. 1. c. 3. s. 16, 20. The declaration should regularly be in the name of the attorney-general; 2 Lev. 82; although, if in the name of the king, as "*coram domino rege venit dominus rex, &c.*" it is good. Id. Com. Dig. Action, B. 1.

*But the king shall not have an action, unless the principal cause of action belong to him ; for, upon the peace broken, or any wrong done principally to another, the king shall sue only by indictment. Th. D. l. 1. c. 3. s. 9, 10, 11, or by information or other matter of record. 3 Inst. 136. Com. Dig. Action, B. 1. And even for the causes, for which he may bring the actions above mentioned, much easier and more effectual remedies are usually obtained by such prerogative modes of process, as are peculiarly confined to the crown : such as *Inquests of office*, for the recovery of real or chattel property to which the king is entitled ; *Scire facias*, to repeal his grants : *Information of intrusion*, in the Exchequer, for a trespass upon the lands of the crown ; as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like : *Information of debt*, in the Exchequer, for money due to the king, or for forfeitures for offences against the excise laws : *Information in rem*, in the Exchequer, when any goods are supposed to become the property of the crown, and no person appears to claim them ; as where goods are seized for a forfeiture, under the laws of customs or excise, and the offender himself has escaped the reach of justice : *Writ of quo warranto*, or information in the nature thereof, in the Court of King's Bench, against a person who claims or usurps any office, franchise, or liberty ; or for non-user or misuser of it : and the *Writ of mandamus*, for refusal of admission to, or for a wrongful removal from, a corporation office ; and also for the purpose of requiring corporations, in certain cases, to proceed to the election of a mayor or other head officer. 3 Bl. Com. 257—265 ; 5 Bac. Abr. Prerogative E. 7. There is a precedent in 1 Saund. 273. R. v. Sutton, of an information of debt in the Court of King's Bench, to recover, for the use of the crown, a debt due to a *jelo de se*. But in a recent case, where an information was filed in that Court by the attorney-general against a sheriff, for a false return to a writ of extent, the Court, upon a motion in arrest of judgment, intimated an opinion that the information should have been filed in the Exchequer. The case, however, stood over ; and the attorney-general being also of opinion that it should have been an information in the Exchequer, it was never afterwards moved. MS. E. 1814.

The Queen.] A queen regnant may sue, of course, in the same manner as the king. *Vide supra*.

The queen consort may sue in any form of action a subject may adopt. She may sue by writ, without naming the king : Th. D. l. 1. c. 4. Co. Lit. 133. a : as in a quare impedit ; 18 E. 3, 1. b. Th. D. l. 1. c. 4. s. 1. ; in a parco fracto ; F. N. B. 101. ; or the like. And if the ground of action be a breach of the peace, the writ shall say, *Pone*

per vadios, &c. A, quod sit &c. ad respondendum tam nobis quam Annæ Reginae Angliæ. F. N. B. 101. The queen, in an action by herself, shall not be amerced, if there be judgment against her. Id. Com. Dig. Action, B. 2.

Other persons.] The king of another kingdom, in amity with this country, may maintain an action in any of the king's courts here. 1 Rol. 133. Com. Dig. Action, B. 1. So the Prince of Wales may *sue by writ. Th. D. l. 1. c. 5. 1 H. 5, 7 b. So a body politic, sole or aggregate, spiritual or temporal. So the inhabitants of a hundred may have debt, or *scire facias*, upon a judgment for them in an action against the hundred; for the statute which allows them to be sued, enables them to sue for costs, if the judgment be for them. R. Fitzg. 296. So an idiot, lunatic, &c. shall sue in his own name. Poph. 141. 1 Brownl. 197. So every other subject of the king, (see 2 Inst. 55, 56,) who has no legal impediment. Com. Dig. Action, B. 3. *Vide infra.*

Aliens.] An alien friend may maintain a personal action, Dy. 2 b, for his goods or property, 1 And. 25., or for slander, *Per four* J. J. Williams, cont. 1 Bulst. 134, Yelv. 198, or the like; but not an action real or mixed. Dy. 2 b. Com. Dig. Alien, C. 5. But an alien enemy cannot have any action, real, personal, or mixed. Dy. 2 b. 10 E. 4, 6. Q. 1 Rol. 195. b. Semb. Ow. 45. Com. Dig. Alien, C. 5. And even if an alien amy commence a personal action, and become an alien enemy at any time during its progress, he cannot further prosecute his suit; 4 East, 502; but where the plaintiff became an alien enemy after verdict, the Court refused to stay judgment and execution, on a summary application. 9 East, 321. And the rule here laid down as to alien enemies, has been holden to extend to Englishmen living in, and carrying on trade under the protection and for the benefit of a hostile state. 3 B. & P. 113. 1 Campb. 482. So, if an alien enemy's property be insured in this country, and a loss occur, no action can be maintained against the underwriter, 6 T. R. 23. 35. 4 Campb. 339, even after the restoration of peace; 4 East, 410. See 3 Campb. 152; although the insurance were effected previously to the commencement of hostilities, if the loss were by capture afterwards; Id. 4 East, 407. 3 B. & P. 191; or although the alien be indebted to his agent here, who brings the action, in more than the amount sued for. 6 T. R. 23. So, where an alien enemy drew a bill upon a person in London, in favour of an Englishman resident in the enemy's country, it was holden that the latter could not sue upon it, even after the restoration of peace. 7 Taunt. 430. See 3 M. & S. 532. 2 Stark. 90. 6 Taunt. 237, 332.

But, if an alien be within the kingdom with a safe conduct, or under the king's protection, he may maintain a personal action, although his

king be at enmity with this country. R. 1 Salk. 46. R. Cro. El. 693. R. Moor, 431. Com. Dig. Alien, C. 5. See 2 Campb. 163. 3 Id. 245. Or, if he be a prisoner of war in this country, he may, after the return of peace, sue upon any contracts made by him whilst a prisoner. 1 Taunt. 32. And where a native of a foreign state, in amity with this country, was taken in an act of hostility on board an enemy's fleet, and brought to England as a prisoner of war, it was holden that he was not disabled from suing while in confinement, on a contract entered into as a prisoner of war. 1 B. & P. 163. See further upon this subject, post, bk. I. ch. 7, in the plea of *Alienage*.

Persons outlawed.] A person outlawed cannot maintain an action; Co. Lit. 128 a. See Lutw. 6. 1529; whether outlawed upon mesne process, or after judgment. Lutw. 1529. The outlawry, however, must be complete; that is, the exigent must be returned, and the outlawry recorded: Co. Lit. 128 b. 288 b. But an executor or an administrator, although outlawed, may sue as such; Co. Lit. 128 a; so may a mayor and commonalty, although the mayor be outlawed. Id. An executor, however, cannot sue, if his testator were outlawed at the time of his decease. Lutw. 1604. And in personal actions, the outlawry of one plaintiff is a good plea to both. Com. Dig. Abatement, E. 2.

But outlawry in the other counties palatine of Chester and Durham, does not prevent a person from suing in the Courts of Westminster, for he is only ousted of his law within that jurisdiction; Co. Lit. 128 a. Fitz. Coron. 233. 12 E. 4, 16. Doct. Plac. 306. 2 Rod. 38. Cro. Car. 566; yet, outlawry in the county palatine of Lancaster does; for that county was erected by act of parliament, Br. Utlag. 52. 1 Vent. 157, the others are by prescription.

If, after the commencement of an action, the plaintiff be outlawed the action will thereby be abated in as full a manner as if he were outlawed before he commenced it; if the outlawry be before plea, it may be pleaded as in ordinary cases; 1 Salk. 178, 5 Mod. 11; if after, it may be pleaded *peris darrein continuance*. But if, in any case, after a plea of outlawry, the plaintiff obtain a charter of pardon [or reverse the outlawry] before the plea is determined, his writ shall not abate, but he may proceed in the action. 44 E. 3, 27 a. Co. Lit. 128 b. Com. Dig. Abatement, E. 2.

Persons excommunicated.] Formerly a person excommunicated could not maintain an action; Co. Lit. 134 a. Lutw. 17; even although he sued as executor, or administrator, Co. Lit. 184 a. 3 Lev. 208. [42 E. 3, 13.] or as a corporation sole, as bishop, &c.; Co. Lit. 134 a; and if there were two or more plaintiffs, excommunication of one was a plea to both. 11. 3. Lev. 208. Com. Dig. Abatement, E. 7. But now, ex-
[*4]

communication is no longer attended with any civil incapacity. 53 Geo. 3, c. 127, s. 3.

Popish Recusant convict.] If a person be a popish recusant convict, and therefore *quasi excommunicatus* by stat. 3 Jac. 1, c. 5, s. 11, he cannot maintain an action. R. 3 Lev. 208. 1 Brow. Ent. 5. Lev. Ent. 11. 2 Mod. Ca. 43. Clift, 3. Com. Dig. Abatement, E. 7.

Persons attainted.] An action cannot be brought by a person attainted of treason or felony, Co. Lit. 130 a. Noy. 1. Sho. 155. See 5 Geo. 4, c. 84, s. 26, or attainted in a *Præmunire*, Co. Lit. 129 b., or by one who hath abjured the realm. Co. Lit. 128 a. Com. Dig. Abatement, E. 3. In felonies not capital, however, the right to sue is again acquired by the party, upon his having undergone the punishment assigned for his offence; 9 Geo. 4, c. 32, s. 3; and in capital felonies, where the punishment is commuted, upon his having undergone the substituted punishment. See 6 Geo. 4, c. 25, s. 1. 7 & 8 Geo. 4, c. 28, s. 13.

*SECT. II.—*Who may or may not be Sued.*

The King.] Until the time of Edw. 1, the king might have been sued in all actions as a common person; 22 E. 3, 3. 43 E. 3, 22. Dub. St. Præ. R. 42. Th. D. l. 4. c. 1. s. 3; and the form was, *Præcipe Henr. Regi Angl. &c.* 24 E. 3, 23, [55. b.] Th. D. l. 4. c. 1. s. 3. But, at present, no person can have an action against the king; his only remedy is by petition. Th. D. l. 4. c. 1. So, no one can vouch the king, for that is in the nature of an action. 3 H. 7, 14. b. 9 H. 6, 3, 4. Th. D. l. 4, c. 2. s. 2. R. Cro. Car. 96. Com. Dig. Action, C. 1. And see as to the remedy by *Petition de droit*, and *Monstrans de droit*, Com. Dig. Prærogative, D. 78—82.

The Queen.] The queen may be sued without the king her husband, in all actions; for she is a person *sole* by the common law. 11 H. 4, 67. b. Th. D. l. 4. c. 2. s. 1. So she may be vouched. 3 H. 7, 14. b. Th. D. l. 4. c. 2. s. 2. Also, the queen dowager may be sued by action, without suing to her by petition. 10 E. 3, 508. [26. b.] 9 H. 6, 12. 11 H. 6, 32. Th. D. l. 4. c. 2. s. 3. Com. Dig. Action, C. 2.

Other Persons.] The Prince of Wales may be sued by writ. Th. D. l. 4. c. 2. s. 4. So may every body politic. So may every subject of the king, ecclesiastical or temporal, man or woman, villain or free; 2 Inst. 55, 56; even although he be deaf, dumb, or an idiot, lunatic, or leper, Th. D. l. 4. c. 2. s. 4, or an alien born, or an infant, 2 Inst. 56. Th. D. l. 4. c. 2. s. 4, or be outlawed, excommunicated, *Ibid.* or convicted or attainted. R. Noy. 1. Th. D. l. 4. c. 2. s. 4. Com. Dig. Action, C. 3. Where a person is convicted, or attainted, however, it is first necessary to obtain the leave of the Court, before he can be charged with a civil action.

*CHAPTER II.

REMEDY BY ACTION FOR INJURIES.

SECT. I.

Remedy for Injuries to Real Property Corporeal.

Ouster of the Freehold.] Ouster of the Freehold is a wrongful putting of the party lawfully seized of lands or hereditaments, out of the seisin thereof; or a wrongful keeping of him out of such seisin, when he is lawfully entitled thereto. It may be effected either by abatement, intrusion, disseisin, discontinuance, or deforcement. The person injured by the ouster may have his remedy, either by entry upon the lands or by action.

When a person, who hath no right, hath taken possession of lands or tenements, the legal owner may make a formal but peaceable entry thereon, (See Bac. Abr. Forcible Entry, B. Com. Dig. Forcible Enter, A. 2, 3.) declaring that he thereby takes possession; which has the effect of giving him seisin, and of thereby making him capable of conveying it either by descent or by purchase. If the lands lie in different counties, there must be an entry in each county; or if they lie in the distinct seisin of different persons in the same county, there must be an entry upon the lands of which each is seized. But if they be in the seisin of one person, and lie all within the same county, an entry upon any part, in the name of the whole, will be sufficient. This entry might formerly be tolled (that is, taken away, or, in other words, the party might be deprived of any advantage arising from it), by a descent cast; as for instance, if a man wrongfully seized of an estate of inheritance in lands or tenements, died seized, and the lands descended from him to his heir (lineal or collateral, Lit. s. 389), the entry of him who had right was thereby taken away; Co. L. 237; whether the deceased died seized in tail or in fee; Lit. s. 385, 386: or whether he came to the land by disseisin, abatement, or intrusion, or by the feoffment, gift, &c. of a disseisor, &c. Co. Lit. 237 b. There was much old learning upon the subject to be found in the text books, and which was noticed in a former edition of this work. But by stat. 3 & 4 W. 4, c. 27, s. 39, no descent cast, discontinuance, or warranty, which may happen or be made after the 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land." Formerly also the person who had title of entry, might, by his own act, prevent it from

being tolled *by a descent, by making continual claim. But now by the same statute, 3 & 4 W. 4, c. 27, "no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action." And besides, as the same time is now limited for bringing an action for land, as for making an entry upon it, (see Id. s. 2. & 10), continual claim, independently of the above clause, would now be useless. As to the time now limited by law for making such an entry or bringing such an action, see chap. 3, post, p. 21.

Actual seisin, however, is seldom, if ever, acquired by entry, and therefore an entry is seldom made; it is sufficient if the lessor of the plaintiff in the ejectment have a right of entry, the entry itself being confessed according to the terms of the consent rule. 2 Arch. Pr. C. B. 34. But wherever there is a vacant possession, and of course no consent rule, an actual entry is still necessary. 2 Arch. Pr. C. B. 48, 49. Formerly also an actual entry was necessary, before an ejectment could be brought, to avoid a fine *with proclamations*; see 4 H. 7, c. 24. 2 Str. 1086. 4 Bro. P. C. 353. Doug. 485. Willes, 182. 7 T. R. 433. 1 Saund. 319 b. &c. 1 Vent. 42. 9 East, 17. And see 1 Barn. & Ald. 85; but fines are now no longer levied, other modes of assurance being substituted for them by stat. 3 & 4 W. 4, c. 74.

As to the remedies by action, they are now very much simplified, being confined entirely to the action of ejectment, writ of right of dower, writ of dower *unde nihil habet*, and *quare impedit*; all other writs of right, writs of *formedon*, and all other real and mixed actions, being abolished by stat. 3 & 4 W. 4, c. 27, s. 36, 37.

Having now stated shortly the nature and effect of an entry upon lands, and the actions which may be brought for the recovery of them, we shall proceed to describe the different species of ouster of the freehold, and the remedies the law affords for them respectively. Ouster of the freehold is of five kinds, viz. :—1. Abatement, 2. Intrusion, 3. Disseisin, 4. Discontinuance, 5. Deforcement.

1. *Abatement* is where a person dies seized of an inheritance in a corporeal hereditament; and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold. Co. Lit. 277 a. Finch. L. 195. The remedy against the abater, in order to obtain possession of the land for the heir or devisee, is by entry or ejectment.

2. *Intrusion* is where, after a particular estate of freehold is determined, and before the person in remainder or reversion enters, a stranger, who has no right, makes entry, and gets possession of the freehold. The remedies for intrusion, also, are by entry or ejectment.

3. *Disseisin* is an ouster of the freehold in the common and vulgar

acceptation of the term ; and may be of corporeal or incorporeal hereditaments. Disseisin, as to corporeal hereditaments, is where a person, who has no right, or at least no right of entry, enters upon lands and tenements, and ousts the owner of his freehold, by turning him or his lessee for years out of possession ; see Com. Dig. Seisin, F. 2 Bac. Abr. Disseisin A. ; as to incorporeal hereditaments, it is a disturbance of the owner in his means of enjoying them, and which he may consider a disseisin or not, at his election. The *remedies for disseisin to incorporeal hereditaments shall be considered in the next section. Those for a disseisin, as to corporeal hereditaments, are by entry or ejectment. A disseisee may also maintain trespass against the disseisor, if he were in the actual occupation of the premises at the time of the disseisin.

4. *Discontinuance* is the alienation, in fee, in tail, or for the life of another, of an estate tail, by tenant in tail, by fine, recovery, feoffment, or by release or confirmation with warranty descending upon the issue, See Com. Dig. Discontinuance. 2 Bac. Abr. Discontinuance. Formerly the issue had no remedy by entry or ejectment, nor by writ of entry, writ of assise, or writ of right ; nor indeed had they any remedy whatever, until the writ of *Formedon* (which was in the nature of a writ of right,) was given to them by the stat. *De Donis*. But now by stat. 3 & 4 W. 4, c. 27. s. 39, " no discontinuance or warranty which may happen or be made after the 31st December 1833, shall toll or defeat any right of entry or action for the recovery of land." The remedy, therefore, for discontinuance of tenant in tail, is now either by entry or ejectment, in the same manner as in the other species of ouster already mentioned.

5. *Deforcement* is such a detainer of the freehold, from him that hath the right of property, but never had any possession under that right, as does not amount to an abatement, intrusion, disseisin, or discontinuance. For this species of ouster there was formerly no remedy by entry or ejectment, (excepting in one or two cases, which shall be noticed presently), but the party was driven to his writ of entry or assise, or writ of right, or writ in nature of a writ of right ; as in the following instances. 1. If dower were not assigned to the widow within the time limited by law, this was a deforcement of dower, for which she might have a writ of "*Dower unde nihil habet*," which is a writ in nature of a writ of right ; or, if part of her dower had been assigned, and she were deforced of part only, her remedy was by writ of *Writ of right of dower*. And these are the only legal remedies she now has, for she has no remedy by entry or ejectment. This writ of dower, however, is very seldom brought at present ; a bill in equity being the remedy now adopted in almost all cases of dower. 2. If a husband during coverture alien his

wife's estate, this is a *deforcement*, (although usually termed a *discontinuance*,) for which, after her husband's death, the widow might formerly have had a writ of entry *sur alienation*, called a *Cui in vita* or, where the wife was seized in fee, and died before the husband, her heir might have had a similar writ, called a *Sur cui in vita*; or she or her heir might recover the property by entry or ejectment, by st. 32 H. 8, c. 28. And the remedies by entry and ejectment are the only ones she now has, as the writs of entry *sur alienation*, *cui in vita*, and *sur cui vita*, have been abolished by stat. 3 & 4 W. 4, c. 27, s. 36. 3. If a husband, during coverture, aliened his wife's estate, and she were afterwards divorced from him, she might have had a writ of entry *sur alienation* called a *Cui ante divortium* against the alienee, during the husband's life-time; or her heir might have had a similar writ, called a *Sur cui ante divortium*; or after the husband's death, either the wife, or her heir, might recover the lands by entry or ejectment, by st. 32 H. 8, c. 28; but *there was no remedy by entry or ejectment at common law, And these remedies by entry and ejectment are the only ones she and her heir now have, the writs of *cui anti divortium* and *sur cui ante divortium* having been abolished by stat. 3 & 4 W. 4, c. 27, s. 36. 4. If a woman gave lands to a man by deed, to the intent that he should marry her, and he refused to do so when thereunto required, but continued to hold the lands, this was a *deforcement*, for which the woman had a remedy by a writ of entry *sur intrusion*, called a writ of entry "*Causa Matrimonii Prælocuti*." This writ, however has been abolished by stat. 3 & 4 W. 4, c. 27, s. 36; but there is no doubt that the woman in such a case may have a remedy by entry or ejectment. There were several other species of *deforcements* noticed particularly in a former edition to this work, for which different writs of entry, and writs in the nature of a writ of right, were assigned either at common law or by statute, namely, the writs of entry, *sur alienation*, called "*Dum fuit infra ætatem*," "*Dum fuit non compos mentis*," the writ "*Ad communem legem*," the writ of entry "*In casu proviso*," the writ of entry "*In consimili casu*," the writ of "*Quod ei deforceat*," the writ of assize, called a "*Nuper Obiit*," the writ of right "*De rationabili parte*," the writ of entry *sur intrusion*, called a writ "*Ad terminum qui præterit*," a writ in the nature of a writ of right, called a writ of right *sur disclaimer*, the writ in the nature of a writ of right, called a writ of "*Cessavit*," and the writ in the nature of a writ of right, called a writ of "*Escheat*." But all these writs are now abolished by stat. 3 & 4 W. 4, c. 27, s. 36.

Ouster of Chattels real.] Ouster of chattels real is, when a tenant for term of years, or tenant by statute or *elegit*, is wrongfully turned out of possession. In the case of ouster of tenant for term of years, his remedy

is either by action of trespass to recover damages, or by ejectment and trespass for mesne profits, to recover the possession and also damages; the action of ejectment is always adopted, when any material part of the term is unexpired, and the plaintiff's title is clear; the action of trespass is adopted, when the plaintiff's title is doubtful, or where the term has either expired since the ouster, or is likely to expire before the action is determined.

There was anciently another remedy, namely the writ of "*Quare ejecit infra terminum*," given by st. Westm. 2, c. 24, to a termed ousted, where the ejector himself is not in possession of the land but some other person who claims under him; but this writ has long since become obsolete and useless, and is now abolished by the 3 & 4 W. 4, c. 27, s. 36.

If tenant by statute or *elegit* be evicted, his remedy is by entry or ejectment; or he may have a *scire facias* and re-extent, by st. 32, H. 8, c. 5. See 1 Arch. Pr. C. B. 262.

Trespass.] If a man enter upon another's ground, or into his house, &c. without a lawful authority, and do some damage (however inconsiderable,) to his real property, he is guilty of a trespass for which the tenant in possession may have an action of trespass *quare clausum fregit*; and the reversioner or remainder-man an *action on the case, if the trespass be an injury to his reversionary interest, such as the cutting down of trees, or the like. So if a man's cattle go upon another's lands, and there tread down his herbage, or spoil his corn or trees, &c. the tenant of the land may either distrain the cattle *damage feasant*, or he may have an action of trespass *quare clausum fregit* against the owner of them. Trespass will also lie for fishing in a several or free fishery.

Nuisance.] Where an injury is committed to a man's habitation or lands, by the act of another, off the premises, and without force, (and which is termed a *nuisance*, if the act be of a permanent nature;) the tenant in possession, and also the reversioner (if the nuisance be to the damage of the inheritance,) may have an action on the case against the party who created or who continues the nuisance, and recover damages for the injury they may have sustained in their respective interests in the property injured. Thus, if a man build a house upon his own land, overhanging the house of his neighbour, whereby the rain fall upon it; 5 Co. 101. 2 Rol. 140, l. 50. 2 Leon, 98; or fix a spout to his own house, whence the rain falls into the yard of his neighbour, and hurts the foundation of his buildings; Fort, 212; or if he build a wall, &c. upon his own land, so as to stop up or darken the ancient lights of his neighbour's house; R. 9 Co. 58 a. 2 Rol. 140, l. 45; or if he erect a lime-kiln, tallow furnace, or any other offensive thing, so near his neigh-

bour's house as to hinder him of the enjoyment of it ; Com. Dig. Action on the Case for a Nuisance, A. ; or if he erect a smelting house for lead, so near his neighbour's land, that the vapour and smoke kill his corn and grass, and damage his cattle ; 1 Rol. 89, l. 15 ; or if he stop a water-course, whereby his neighbour's land is overflowed : 2 Rol. 140, l. 30 : in all these instances he is guilty of a nuisance ; for which the injured party may have his remedy by action on the case.

A nuisance may also be committed to incorporeal property, as to ways, franchises, &c. for which the remedy is also by action on the case. As if a man have a right of way over another's land, and the tenant of the land plough up the way ; 2 Rol. 140, l. 7 ; or if a man erect a fair or market so near another's, and hold it on the same day, whereby the other is deprived of the profit and advantage of his franchise ; 2 Rol. 140, l. 10 ; or the like.

The action on the case merely gives damages, but does not remove the nuisance. It may have the effect, however, of compelling the defendant to abate the nuisance, as the injured party may bring successive actions for it, as long as the defendant continues it, and recover damages against him for the continuance, as well as for the original erection of it. Formerly, if the tenant in possession had a freehold interest, he might have had an assise of nuisance, or a writ of *Quod permittat prosternere*, by which the defendant might be compelled to abate the nuisance ; but these remedies have been long obsolete, and are now abolished by stat. 3 & 4 W. 4, c. 27, s. 36. But a tenant, even for years, may justify entering upon the premises where the nuisance is erected, and abating it, provided in doing so he commit no breach of the peace, and cause no unnecessary damage.

What has now been stated, relates to private nuisances only. As to public nuisances, such as not repairing public highways, or the like, no remedy can be had by action for any ordinary damage arising from them ; the only mode of proceeding is by indictment. Yet where an individual receives some extraordinary special damage, beyond the rest of the king's subjects, from a public nuisance, as where a ditch is cut across a public way, and a man in the night time, (although using ordinary precaution,) falls into it, whereby he or his horse or carriage suffers an injury, he may have a private satisfaction by action on the case, for the injury he has thus sustained, notwithstanding that the party who has made the ditch be also indictable for the public nuisance.

Waste.] Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, committed or permitted by tenant for life or years, to the disherison of him that hath the remainder or reversion in fee simple or fee tail ; as, by removing wainscots, floors, &c.

cutting down timber, converting meadow or pasture into arable land, digging pits or mines to search for coal, &c., and the like. For these, the person who has the next immediate estate of inheritance, as remainder-man or reversioner, may, if the waste be such as to be injurious to the inheritance, have his remedy by action on the case. Formerly, also, he might have a writ of waste, to recover the land wasted, and also treble damages; but the writ of waste is now abolished by stat. 3 & 4 W. 4, c. 27, s. 36. There was also an ancient writ, called a writ of *Estrepement*, which the demandant in a real action or in a writ of waste, might have had at any time *pendente placito*, and before judgment executed, to prevent the tenant from committing waste; which, however, has long since been superseded in practice by the present mode of applying to a Court of Equity for an injunction to stay waste.

A rector may also have an action on the case against the executors or administrators of the former rector, for dilapidations.

Also, if a commoner have a right of common in the place wasted; as if a man have a right of common of estovers in a wood, and the tenant destroy the wood, the commoner may have his remedy by action on the case against the tenant.

SECT. II.

Remedy for Injuries to Real Property incorporateal.

Advowson, &c.] If a stranger, who hath no right, present to a church, and have his clerk admitted and instituted, the real patron may recover the seisin of the advowson by writ of *Quare impedit*; and if the *Quare impedit* be brought within six months after avoidance, also the presentation by the opposite party shall be thereby avoided. Formerly, the patron might also have had assise of darrein presentment, or if the real patron were tenant in fee-simple, he *might have a writ of right of advowson, which was a final and conclusive remedy. But the assise of darrein presentment, and the writ of right of advowson, have been abolished by stat. 3 & 4 W. 4, c. 27, s. 36, and the *quare impedit* is now the only remedy.

Formerly, if the bishop refused to admit and institute the clerk presented, the patron, after suing out his *Quare impedit*, might, if no other clerk had been then admitted, sue out a writ of *Ne admittas*, forbidding the bishop to admit any clerk whatsoever until the *Quare impedit* should be determined; and if he afterwards, notwithstanding this writ, admitted a clerk, the plaintiff, if he recovered in the *Quare impedit*, might have a special action against the bishop, called a *Quare incumbavit*, to

recover the presentation, and also a compensation in damages. But these writs of *Ne admittas*, and *Quare incumbravit*, seem to be abolished by the general words of stat. 3 & 4 W. 4, c. 27, s. 36. So, if after judgment for plaintiff in a *Quare impedit*, and a writ *ad admittendum clericum* to the bishop, the latter did not admit and institute the plaintiff's clerk, the plaintiff might have had a writ of *Quare non admisit* against the bishop, and recover ample damages; and this writ might possibly be had now; but the ordinary action on the case is a much simpler and better remedy.

As to his glebe, &c. the clerk, when instituted, has the same remedies for ouster, trespass, nuisance, &c. as other owners of corporeal property in ordinary cases.

If a man be disturbed in his possession of a pew in a church, he may have an action on the case for the disturbance; and twenty years undisputed and uninterrupted possession will be deemed sufficient evidence of a title to it by grant or otherwise, unless the presumption be rebutted by other evidence to the contrary.

Tithes.] As to prædial tithes, (*viz.* of corn, hay, or the like,) if the tenant of the land carry away such corn, &c. before he has justly divided or set forth the tithe thereof, or otherwise agreed with the parson, vicar, or other owner or farmer of the same, such parson, &c. may have an action of debt against him, upon st. 2 & 3 Ed. 6, c. 13, and recover treble the value of the tithes. Or if they be set out, and a stranger take them away, the parson may have his remedy by action of trespass; 50 Ed. 3, 20 b.; and on the other hand, if not taken away by the parson within a reasonable time after notice of there being set out, if the tenant thereby sustain any damage, he may have an action on the case against the parson, and recover damages.

By st. 7 & 8 W. 3, c. 6, 53 Geo. 3, c. 127, s. 4, and 7 Geo. 4, c. 15, all tithes under 10*l.* may be recovered by summary application to a justice of the peace; and the same by 7 & 8 W. 3, c. 34, and 53 Geo. 3, c. 127, s. 6, as to tithes under 50*l.* due from Quakers. And lastly, by st. 32 H. 8, c. 7, persons having an estate of inheritance, freehold, term or interest, in tithes, shall have the same remedy in the temporal courts for the recovery thereof, if disseised or otherwise put or kept out of possession, as they may for lands or other hereditaments. An ejectment, therefore will lie for tithes, although for no other incorporeal hereditament; so an action of assumpsit, where there is an agreement for a certain sum in lieu of tithes; so *an assise, writ of right, *quod ei de-forceat*, &c. A very usual remedy, however, where any dispute arises, is by bill in the Exchequer against the parishioner, for the subtraction, and for

a discovery : whereupon the Court will decree the single value with costs, and payment in *futuro*. See Com. Dig. Dismes, M. 13, &c.

Commons.] First, as to common of pasture : if a stranger, who hath no right, put his cattle upon the common, the lord may distrain them damage feasant, or may have his remedy by action of trespass : and the commoner may distrain them damage feasant, or have his remedy by action on the case.

If a commoner surcharge the common, the lord may distrain the extra beasts, or may have his remedy by action of trespass ; and the other commoners may have their remedy by action on the case. Either lord or commoners also may have a writ of admeasurement of pasture against a commoner who has surcharged the common ; and if, after the extent of his right of common has been ascertained under this writ, he again surcharge the common, a writ *de secunda superoneratione* lies against him, whereby the plaintiff shall recover his damages, and the extra cattle shall be forfeited to the crown. These writs, however, are wholly obsolete in practice.

If the lord encloses the common, or part of it, without leaving sufficient for the commoners, or if he plough it up, or erect a rabbit warren in it, or the like, whereby the commoner is disturbed in the enjoyment of the common, the commoner may have his remedy by action on the case against the lord. Formerly, he might have an assise of *novel disseisin*, or a writ of *quod permittat prosternere* ; but these remedies were never recently resorted to in practice, and are now abolished by stat. 3 & 4 W. 4, c. 27, s. 36.

As to common of piscary, turbary, estovers, &c. if any person, having a right to such common, be disturbed in his enjoyment of it, the general remedy is by action on the case.

Ways.] If a man have a right of way over another's land, and be disturbed in the enjoyment of it, either by the tenant of the land, (as by inclosing it, ploughing across it, or otherwise obstructing it,) or by a stranger, the general remedy is by action on the case against the person who has caused the obstruction. Formerly, if the injured party were seised in fee, he might have a writ of *quare obstruxit*, which was of the nature of a writ of right ; but it has long been obsolete, and is now abolished by stat. 3 & 4 W. 4, c. 27, s. 36.

Offices.] If a man be disturbed in his enjoyment of the profits of an office, or in his execution of the duties of it, he may have his remedy by action on the case. Formerly, if he had a freehold in his office, and another intruded into it, and disturbed him in the enjoyment of it, he might have had an assise for the disseisin ; but this was never adopted in modern times, and is abolished by stat. 3 & 4 W. 4, c. 27, s.

36. A very general mode of trying the title to an office, however, where fees are received, is by an action of assumpsit for the amount of the fees received, as for so much money had and received to the plaintiff's use.

**Dignities.]* If there be a dispute whether a man be a peer of the realm, generally, it shall be tried by the record of parliament; Co. L. 16 b. 7 Co. 15, Calvin. 9 Co. 31 a. 49 a. 19 Ass. pl. 24; but where he claims by descent, though he ought to produce the patent of creation, it shall be tried by the country. Skin. 520. If any person, however, become heir to a barony in fee, and be not summoned to parliament, he may sue to the king by a petition of right; R. Skin. 432. Com. Dig. Dignity, D.; and the matter will thereupon be determined in the house of peers.

Franchises.] If a man have the franchise of holding a court leet, and another person, by distress, menaces, or persuasions, prevail upon the suitors not to attend his court, or of keeping a fair or market, and another obstruct the passage to it, or hold another market, &c. on the same day, in the immediate neighbourhood of it; or of free warren, and another hunt in it; or of taking toll, and another refuse to pay it; or of seizing waifs or estrays, and another hinder him from seizing them whereby they escape out of the liberty; or, in short, if he have any other species of franchise, and be disturbed or incommoded in the lawful exercise thereof: he may have his remedy by action on the case; or, in case of toll, he may distrain for it, if he please. 3 Bl. Com. 236.

Annuities.] Annuities, in the legal acceptation of the term, charge the person only, and not the land, and the ancient remedy was by writ of annuity; if they charge the land, they are called rent charges, and the grantee of such a rent charge had an option to distrain for arrears, or to bring his action of annuity, unless the person of the grantor were expressly discharged by the grant. But at present the remedy for arrears of an annuity is by action of debt or covenant, and for arrears of a rent charge, also by action of debt or covenant, or by distress. See the Fourth Section of this Chapter.

Rent Service, &c.] For rent service or rent charge, the party might have his remedy by distress, at common law; and that remedy is now extended to rents, termed rents seck, which are the same as rent charge, excepting that no power of distress is reserved in the deed creating them. The remedy by distress may be had by the lessor against the lessee, by the grantee against the grantor, or by or against their respective assignees.

Next as to the remedy by action: for a rent charge, we have seen that the grantee may have a writ of annuity; or, which is most usual,

an action of debt or covenant ; or if a power of entry be given to him in the deed creating the rent charge, he may have an action of ejectment.

For rent service, if the letting were without deed, the remedy is by action of debt, or of debt or assumpsit for use and occupation, whether by the lessor against the lessee, or by or against their respective assignees. But if the letting were by deed, the remedy is by debt or covenant ; or, if the lease contain a clause of re-entry for non-payment of rent, the lessor or his assignee may proceed to obtain possession of the premises by ejectment. So, the assignee of the *reversion may have debt or covenant against the lessee. If the lessee have assigned his interest in the term, the lessor may have debt or covenant against the assignee ; so may the assignee of the reversion. Or the lessor, instead of bringing his action against the assignee, may have debt against the lessee or his executor, if he have not accepted the assignee as his tenant ; or covenant, whether he have accepted him as tenant or not, if there be an express covenant for payment of rent in the lease.

There were formerly several ancient remedies for rent service, which are now however abolished by stat. 3 & 4 W. 4, c. 27, s. 36, such as the *assise de mort d'ancestor*, and of novel disseisin, which lay of rents as well as of lands ; the writ *de consuetudinibus et servitiis*, for a specific payment or performance of the rent or services ; the writ of *cessavit*, to recover the land, if the tenant ceased to perform the services for two years together. On the other hand, the tenant was entitled to a writ of *ne injuste vexes*, if the lord distrained for greater services than were due ; instead of which the tenant may now have his remedy by action on the case ; and the tenant was also entitled to the writ of *mesne*, if the mesne lord allowed his tenant to be distrained upon by the lord paramount ; for which is also at present substituted the action on the case.

For fealty and suit in court, the only remedy is by distress, which may be repeated from time to time, until the tenant swear fealty or do suit.

For *Heriot custom*, the lord may seize the best beast or other heriot, Bro. Heriot, pl. 2, 3, but it seems he cannot distrain, Keilw. 32. Bendl. 30, pl. 47. D. and St. 2, c. 9. For Heriot service, the lord may either seize or distrain: Plowd. 96. Cro. El. 589.

For other services by custom and prescription, such as suit to an ancient mill, to an ancient public oven, malt-kiln, or the like, the ancient remedy was by writ *de secta ad molendinum*, *secta ad furnum*, *secta ad torrale*, and the like, to compel a specific performance ; but the remedy at present uniformly adopted is, the action on the case for damages, the writs above-mentioned being abolished by stat. 3 & 4 W. 4, c. 27, s. 36.

SECT. III.

Remedy for Injuries to Personal Property in Possession.

Amotion.] If personal chattels be wrongfully taken from a man, who hath either an absolute or special property in them, he may either replevy them, and then proceed in his action of replevin for damages; or he may have an action of trespass, or trover, for damages; or he may have an action of detinue, for the goods or their value, and damages: If his right of property in the goods be doubtful, he should not adopt replevin; if there be a doubt as to the joinder of parties, he should not adopt detinue.

If a man distrain the goods or chattels of another, and they be rescued as he is carrying them to the pound; or if, after they are impounded, the pound be broken and the goods, &c. taken away: *his remedy is by action on the case against the rescuers or persons who have broken the pound; or he may have a writ of *rescous*, or writ *De parco fracto*, both of which, however, are obsolete in practice.

Unjust detainer.] A detention of goods may be unlawful, although the original taking were lawful: as where goods are distrained for rent, and the rent afterwards paid; or where goods are pledged with a bailee, and the money borrowed and interest afterwards paid; or where goods are delivered to a bailee for safe keeping, &c. and he afterwards refuse to restore them. For this injury, the usual remedy is by action of trover; or the owner may have detinue, or, it seems, replevin (F. N. B. 69 G.), at his option.

Injuries to property in possession without amotion.] For all other injuries to personal property in possession, where they are not taken from the owner, the remedy is by action of trespass, or action on the case. Where the act complained of is in itself immediately injurious to the property, and therefore necessarily accompanied with some degree of force, as hunting a man's deer, chasing his sheep, shooting his dog, breaking his furniture, or the like, the remedy is by action of trespass; and this, whether the act were designed and intentional, or not. But where the injury is merely consequential, and not the direct and immediate effect of the act; as if a man place a log of wood in a common highway, and the carriage of a another be upset and injured by passing over it or running against it; or if the injury arise from a nonfeasance: the remedy is by action on the case. And even in cases where the injury is immediate and trespass would lie, yet if the injury have arisen from the carelessness, negligence, or ignorance of the defendant, the plaintiff may adopt either trespass, or case, at his option.

In order to maintain trespass, however it is necessary that the plaintiff should have been in the actual, or at least the constructive, possession of the chattel, at the time it was injured. Therefore, if a man lend his horse to another on hire, and a third person injure the horse by running his carriage against it, the man only who hired it can maintain trespass; the remedy for the other is by action on the case. But if the owner in that case had lent his horse gratuitously, his remedy then would be trespass, and not case; for, by construction of law, the possession remained in him, in the same manner as if his servant were riding the horse at the time of the accident.

Sect. IV.

Remedy for Breach of Contract.

Express contracts.] If the contract be to pay money the remedy for a breach of it is by action of debt, if the contract be by bond; or by debt or covenant, if the contract be by any other deed; or by debt or assumpsit, if the contract be not under seal. But if the contract be not for the payment of money, but for the performance of some other specific act, the remedy for a breach of it is—by *action of covenant, if the contract be under seal; or by assumpsit, if the contract be not under seal.

It may be necessary to mention, as to bills of exchange and promissory notes, the remedy by the payee against the drawer may be by action of debt or assumpsit at his election; but by the payee or indorsee against the acceptor, or by indorsee against the drawer, or by indorsee against indorser, the remedy is by assumpsit only.

Implied contracts.] Contracts implied by law, are such as reason and justice dictate and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his non-performance.

Thus the word "demise" in a lease, is equivalent to a covenant for quiet enjoyment, and if the lessee be ousted, he may have his remedy against the lessor by action of covenant. 1 Rol. 519. F. R. 4 Co. 80 b. Dy. 257 a. R. 2 Leon. 104. Cro. El. 674. R. 2 Cro. 73; so if a man demise or assign by the word "*Concessi*;" so if he demise "*reddendo*" rent, covenant lies for non-payment of the rent, upon the word *reddendo*. 1 Rol. 419. l. 25. 1 Sid. 286; 447. *And see other cases to the like effect*, Com. Dig. Covenant, A. 4. post, bk. 4. ch. 6.

If a man deliver goods to another by his order, without expressly agreeing for the price, the law implies that it was agreed upon between them, that the real value of the goods should be paid; and the

seller may have his remedy for this value by action of assumpsit or debt on a *quantum valebant*. So if I employ a man to do work for me, without fixing upon the amount of his wages, the law implies an agreement upon my part to pay him a fair compensation for his labour; and he may recover it for me, in an action of assumpsit or debt on a *quantum meruit*. If I lend money to another, or lay out or expend money on his account and at his request, the law presumes an agreement upon his part to repay it to me, and I may have an action of assumpsit or debt against him for the amount of it. So if a man receive money which belongs to me, or which in equity and justice he should not retain, and which ought to be paid to me, I may maintain assumpsit or debt against him for the amount of it, as for so much money had and received by him to my use. And lastly, if upon an account being stated between two persons, a balance appear to be due from one to the other, the law implies an agreement to pay the amount of such balance, and an action of assumpsit or debt may be maintained for it.

If an act of parliament inflict a certain penalty for a particular act, an action of debt will lie for the penalty, if no other remedy be specified in the statute: for the law implies that by the fundamental contract of society, the offending party is bound and hath virtually agreed to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. But where a statute prohibits an act injurious to an individual, and does not assign any certain penalty for it, the remedy for the party grieved is by action on the case.

When a judgment is given for damages, or debt and damages, or costs, the law also implies a contract by the party to pay the amount of them; and the judgment is therefore considered a debt, for which the other party may have his remedy by action of debt. Upon judgments for the plaintiff, this is not at all times an advisable proceeding; for he is not entitled to costs in such an action, unless the court shall otherwise order. 43 G. 3, c. 46, s. 4. 2 Arch. Pr. C. B. 291. But as this statute does not extend to actions on judgments for a defendant, a defendant may adopt this remedy by action of debt on his judgment, if he think it more advisable than a *scire facias*. For the amount of a foreign judgment, the remedy is by action of assumpsit or debt; but upon an Irish or Scotch judgment, the remedy is by action of debt only.

For the same reason, debt lies for an amercement set in a court leet or court baron; also, for forfeitures imposed by the bye-laws and private ordinances of a corporation.

And lastly, if a man undertake an office, employment, trust or duty, he thereby, in contemplation of law, impliedly contracts with those who employ him, to perform that with which he is entrusted, with

integrity, diligence and skill ; and if he fail to do so, it is a breach of contract, for which the party may have his remedy by action on the case, or in most cases by action of assumpsit. Thus if a public officer be guilty of neglect of duty, or a palpable breach of it either of nonfeazance or misfeazance ; as if a sheriff do not execute a writ, or wilfully make a false return to it : the person thereby injured may have his remedy by action on the case. So if a gaoler suffer a prisoner in his custody to escape, the party at whose suit he was in custody may have his remedy by action on the case, if the prisoner were in custody upon mesne process ; or by debt or case, if he were in custody in execution. So if through any gross and culpable negligence of an attorney his client be damaged, the client may have his remedy by action of assumpsit or action on the case. So if a common innkeeper allow the goods of his guest to be stolen ; or a common carrier or barge-master lose or injure goods given to him to carry ; or a farrier lame a horse in the shoeing of him ; or a tailor or other workman do not execute his customers' work in a workmanlike manner ; or a person, to whom goods are bailed, do not take the same care of them that he would if they were his own property ; or a public innkeeper refuse to receive a guest ; or the owner of a public conveyance refuse to receive a passenger : these are breaches of implied contract above mentioned, for which the party thereby damaged may have his remedy by action of assumpsit or action on the case. So upon a sale of goods, there is an implied undertaking that the seller has a good title to them, and may lawfully make sale of them ; and if this turn out not to be the case the purchaser may have his remedy by assumpsit or case. Upon a sale of provisions also, it is always implied that they are wholesome ; and if they be not, the buyer may have his remedy by action on the case. But in all other cases of sales, the warranty as to the quality of the goods must be expressed and to such express warranty, as where a horse is warranted sound or the like, the law annexes a tacit contract, that if it be otherwise than warranted, the vendor shall make compensation to the buyer, and the latter may thereupon have his remedy by assumpsit or action on the case. If a man however, *sell me goods which he knows to be unsound, and have used any art to disguise them ; or if they be different in any respect from what he represents them to be ; or if a man cheat me with false cards or dice, or by false weights or measures ; or if I be injured in any other respect by the falsity or deceit of another I may have my remedy by action on the case ; for the law always implies a contract that every transaction is fair and honest. 10 Co. 56 ; 3 Bl. Com. 164.

SECT. V.

Remedy for Injuries to the Person, &c. of an Individual.

To his Person.] For battery, wounding or mayhem, or for an attempt to commit any of these (which in law is termed an assault,) the injured party may have his remedy in damages, by action of trespass. Even for a threat or menace to commit any of these injuries, Reg. 104 b. 2 Rol. 545 l. 25, 41, or to pull a man's house down, Reg. 108, or the like, if any injury arise to the party from such threat or menace, the remedy, it seems, is also by action of trespass. Com. Dig. Battery, D.

For false imprisonment, that is, for every confinement or detention of a man, against his will, without sufficient authority, the party so imprisoned may have his remedy in damages by action of trespass.

To his health.] If a man's health be injured, by the exercise of a noisome trade which infects the air in his neighbourhood, or by selling him bad provisions or wine, he may have his remedy by action on the case. Or if he receive any injury from the neglect or unskilful management of his physician, surgeon or apothecary, he may have assumpsit or case, at his option.

To his reputation.] For slanderous words, or for libels if published; or for words or writing, not amounting to slander or libel, if a special damage be occasioned to the party by them: the party injured may have his remedy in damages, by action on the case.

Also, for preferring a malicious indictment or prosecution against a man, he may have his remedy by action on the case; or by action of conspiracy, which however is now obsolete.

To his family.] For criminal conversation with a man's wife, he may have his remedy by action of trespass, or action on the case. So, for taking away a man's wife, although not by force, he may have his remedy in damages by action of trespass; or for persuading or enticing her to live separate from him, without a sufficient cause, he may have an action on the case. So, for an assault and battery, &c. of a man's wife, he may have an action of trespass.

For debauching a man's daughter, he may have his remedy in damages, by action on the case.

For enticing a man's hired servant to leave his service; or for *hiring him or receiving him as a servant, knowing him at the same time to be the servant of another: the master so injured may have his remedy by action on the case. So, for a battery or false imprisonment of a servant, his master may recover damages in an action of trespass.

I have now pointed out shortly the various remedies by action, which our laws afford for injuries to a man's property or person; they will be found, however, treated of at large in the second and subsequent books of the present work. Great care must be taken in adopting the proper form of action: for if a wrong form be adopted, the plaintiff will be nonsuited at the trial; or if it appear, upon the face of the pleadings, the defendant may take advantage of it either by demurrer, by motion in arrest of judgment, or by writ of error.

*CHAPTER III.

THE TIME LIMITED BY LAW FOR BRINGING AN ACTION.

Entry, Distress or action, for land or rent.] By stat. 3 & 4 W. 4, c. 27, s. 2, it is enacted, that after the 31st December, 1833, "no person shall make an entry or distress, or bring an action, to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued through any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." And by sec. 3, where the party or the person through whom he claims, was in possession or receipt of rents or profits, and was dispossessed, &c., then the time of limitation shall reckon from the time he was dispossessed or ceased to receive the profits; but when he claims through a person who was seised until his death, then the time of limitation shall reckon from the death; when he claims an estate in possession under an instrument (other than a will) made to him or to the person under whom he claims, by the person in possession, and no person shall have been in possession under such instrument, then the time of limitation shall reckon from the time the party was entitled to possession under the instrument; when the estate claimed shall be a reversion or remainder, and no person shall have been in possession or receipt of rents under it, then the time of limitation shall reckon from the time at which it became an estate in possession; or if the party claim by reason of a forfeiture or breach of condition, then the time of limitation shall reckon from the time such forfeiture was incurred or such condition was broken. And by sect. 15,

In all cases where there is no adverse possession at the time of passing this act, the claimant may make an entry or distress or bring his action at any time within five years after, notwithstanding the twenty years hereinbefore limited shall have expired. And by sect. 14, where there is an acknowledgment in writing of the claimant's title, by the person in possession or receipt of rent, &c., the time of limitation shall reckon from the date of such acknowledgment. But by sect. 10, no person shall be deemed to be in possession as aforesaid, merely by reason of his having made an entry on the land. By sect. 35, the receipt of rent from a tenant from year to year or other lessee, shall, as against such lessee or persons claiming under him, be deemed to be the receipt of the profits of the land, within the meaning of the act.

As to the time of limitation with respect to remainder-men or *reversioners, there seems to be some discrepancy in the act which I cannot very well explain. By the 3d section, above mentioned, where the estate claimed is a reversion or remainder, and no person shall have been in possession or the receipt of rents under it, then the time of limitation shall reckon from the time at which it became an estate in possession, that is to say, at the time the previous estates tail, &c. were exhausted and determined. See *Doe v. Pike*, 3 B. & Ad. 738. And by sect. 4, when a reversioner or remainder-man is entitled to enter or bring an action for a forfeiture or breach of condition, and fail to do so, he may afterwards do so within the limited time after the estate has become an estate in possession in such manner as if such forfeiture, &c. had never occurred. Again, by sect. 5, "a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent." And if the person in possession be tenant at will, the right of the party entitled, subject to such tenancy, shall be deemed to have first accrued at the determination of such tenancy, or at the expiration of one year from the commencement of it, at which time such tenancy shall be deemed to have determined; but no mortgagor or *cestui que trust* shall be deemed a tenant at will to his mortgagee or trustee, within the meaning of this clause. S. 7. In like manner, if the person in possession be tenant from year to year, the

time of limitation for the party claiming to be entitled, subject to such tenancy, shall reckon from the end of the first year, or from the last time when rent for the same shall have been received. S. 8. So, where the person in possession holds under a lease, at a yearly rent of twenty shillings or upwards and such rent is paid to some person wrongfully claiming the same, the time of limitation for the party rightfully entitled, subject to such lease, shall reckon from the time when the rent was first so received by the person wrongfully claiming it. S. 9. But on the other hand, by sect. 21, when the right of a tenant in tail of any land or rent to make an entry or distress or bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred. See also sect. 22. So, by sect. 22, if the time of limitation begin to run against a tenant in tail, and he die before it expires, all persons after him, who claim a right or interest which the tenant in tail might have barred, must enter, distrain or bring their action within the same time as the tenant in tail should have done if he had lived. These appear to be perfectly inconsistent with the 3d, 4th, and 5th sections already mentioned; and the only way I see of reconciling them is, by supposing that, as the 21st and 22d sections relate to remainders and reversions which might be barred by the owners of the previous estates tail; the legislature meant by the 3d 4th, and 5th sections only reversions or remainders after estates for life, &c., which could not be so barred. But if this is the construction to be given to these sections, it is to be regretted that it is not a little more plainly indicated by the statute. By sect. 20, if a person entitled to an estate or interest in possession, neglect to enter, distrain, or bring his action within the time limited for that purpose, and during such time he become entitled to another estate in remainder or reversion in the same land or rent, he shall not enter, distrain or bring an action for the latter, unless in the meantime the land or rent have been recovered by some person entitled to an intermediate estate or interest in it. This again seems to clash in some degree with the 4th section already mentioned.

In the case of an administrator, he shall be deemed to claim as if there had been no interval of time between the death of the intestate and the grant of the letters of the administration. *Id.* s. 6.

By sect. 12, where a coparcener, joint tenant, or tenant in common, is in possession or receipt of the entirety, or of more than his or her share of the estate, rent, &c., for his own benefit, such shall not be

deemed the possession or receipt of the other coparceners, joint tenants, &c. See *Doe v. Phillips*, 3 B. & Ad. 753. And by sect. 12, when a younger brother or relation of the heir at law enters into possession or receipt of rent or profits, and shall not be deemed the possession or receipt of the heir.

If at the time the right accrues, the party entitled be under any of the following disabilities, namely, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, such party or the persons claiming under him may enter, distrain or bring his action within ten years next after the disability ceases; Id. s. 16; but not after forty years from the time the right first accrued. Id. s. 17. And if at the time such disability ceases or the party dies, the party next entitled be also under any of the said disabilities, no further time than the said ten years, &c. shall be allowed him to enter, distrain or bring his action by reason, of his disability. Id. s. 18. By sect. 19, no part of Great Britain or Ireland, nor the islands of Man, Guernsey, Jersey, Alderney or Sark, nor any island adjacent to them (being part of his Majesty's dominions) shall be deemed to be beyond seas within the meaning of this act.

It may be right to add, that it is only when the possession, &c. of the defendant is adverse to the party claiming, that the time above limited begins to run at all; and it is for the defendant to prove the possession to have been adverse, if that matter appear at all doubtful from the circumstances of the case. *Doe v. Pike*, 3 B. & Ad. 788.

The like, by Ecclesiastical or Eleemosynary Corporation.] Any entry distress, or action to recover any land and rent, by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, shall be made or brought within sixty years, or within the period during which two persons in succession shall have held the office or benefice in *respect of which the land or rent shall be claimed, and six years after a third person shall have been appointed thereto, whichever shall be longest, after the right first accrued. 3 & 4 W. 4, c. 27, s. 29.

Quare impedit, &c.] No person shall bring any *Quare impedit* or other action or suit to enforce a right to present to or bestow any church, vicarage or other ecclesiastical benefice, as patron thereof, after sixty years, or the period during which three clerks in succession shall have holden the same, (3 & 4 W. 4, c. 27, s. 30,) not exceeding 100 years; Id. s. 33; after which such right shall be deemed extinguished; Id. s. 34; and incumbencies after lapse, but not those after promotions to bishopricks, shall be deemed to be within the act. Id. s. 31. And every person claiming such right to present, by reason of any estate

which a previous tenant in tail might have barred, shall be deemed to claim though the tenant in tail, and the right to bring a *Quare impedit*, &c. shall be limited accordingly. Id. s. 32.

Dower.] No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. 3 & 4 W. 4, c. 27, s. 41.

As to Money due on Mortgage or charged on Land or Legacies.] No action, suit, or other proceedings shall be brought, to recover money due on any mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, or any legacy, but within twenty years next after the right thereto accrued to some person capable of giving a discharge for the same, unless in the meantime some part of the principal or interest shall have been paid, or some acknowledgment given in writing signed by the party or his agent, and then within twenty years after such payment or acknowledgment. 3 & 4 W. 4, c. 27, s. 40.

As to Rent, or Interest on Money charged on Land.] No arrears of rent, or of interest in respect of money chargeable on or payable out of land or rent, or in respect of any legacy, shall be recovered by any distress, action, or suit, but within six years after the same shall become due, or after an acknowledgment of the same in writing, signed by the party or his agent; but when any prior mortgagee or other incumbrancer shall have been in possession or receipt of the profits within one year before an action or suit by a subsequent mortgagee, the latter may recover the arrears or interest which accrued during the possession, &c. of the prior mortgagee, although that may exceed six years. 3 & 4 W. 4, c. 27, s. 42. But the action of debt for rent upon an indenture of demise may be brought within ten years after the session of parliament, 3 & 4 W. 4, or within twenty years after the cause of action. 3 & 4 W. 4, c. 42, s. 3; and see under the head "Debt," post, p. 28, 27.

As to the limitation of suits in equity for land or rent, see 3 & 4 W. 4, c. 27, s. 24, 26; of suits between *cestui que trust* and *trustee to recover land or rent, Id. s. 25; of suits to redeem mortgages, Id. s. 28.

Prescription, &c. as to Right of Common, Ways, Watercourses, Lights, &c.] By stat. 2 & 3 W. 4, c. 71, s. 1, "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our lord the king, or of any ecclesiastical or lay person or body corporate, (except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall where such right, profit, or benefit shall have been actually taken and

enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

And by sect. 2, "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king or of any ecclesiastical or lay person, or body corporate, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

And by sect. 3, "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

And by sect. 4, "no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof."

And by sect. 5, "in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right *generally without averring the existence of such right from time to time immemorial, such general allegation shall still be deemed sufficient, and if the

same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

And by sect. 6, "in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period than is mentioned in this act."

By sect. 7, it is provided "that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

By sect. 8 also it is provided, "that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water, shall have been enjoyed, or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

Personal Actions.] The action of *assumpsit* must be commenced within six years next after the cause of such action. 21 Jan. 1, c. 16,

§ 2. This statute extends to actions of assumpsit upon foreign judgments, 2 Vern. 540, upon bills of exchange or promissory notes, R. 4 Mod. 106. Show. 341. Carth. 3. 226. 3 & 4 Ann. c. 9. for an attorney's fees, R. 3 Lev. 367. R. Carth. 144, and to actions by the assignees of a bankrupt for a debt due to the bankrupt; 2 Lev. 166. Comb. 70; as well as to other cases. If a bill of *exchange be given for money lent or the like, the time of limitation begins to run, not from the time of the loan, but from the time the bill of exchange became due; 1 H. Bl. 631; and in the case of a note &c. payable after sight, not until after it has been presented for payment; 2 Taunt. 323; in the case of a note payable in a certain time after demand, not until demand made, and the time has expired. R. & M. 358. So if goods be sold at a certain credit the time of limitation does not begin to run until the credit has expired. See 2 B. & Ad. 431. So if the assumpsit be to do a thing upon request, Godb. 437. Lev. 48. 1 Sid. 66. See 1 Taunt. 572, or upon the happening of a certain event, Godb. 437. 1 W. Bl. 353. Jon. 194, 329, the time of limitation does not begin to run until after request made, or the event has happened. So, if the consideration be executory, as in the case of contracts for seamen's wages, 6 Mod. 26, or the like, see 2 Salk. 422. 2 L. Raym. 838. 1 Camp. 539, the time of limitation does not commence until after the consideration has been executed. But in assumpsit for negligence or breach of duty in a profession or trade, the time of limitation begins to run from the negligence or breach of duty, and not merely from the time the plaintiff has been injured by it. 2 B. & B. 73. 3 B. & A. 288. 626.

Where the defendant promised in writing to pay the plaintiff, "both interest and principal, as soon as convenient;" the court held this to be a good promise to take a case out of the statute of limitations; that it was not necessary that it should state the amount of the debt, and they inclined to think that, as the writing contained no date, that might be supplied by extrinsic evidence; but they held that it was incumbent upon the plaintiff at the trial to prove that a time had arrived when it was convenient to the defendant to pay. *Edmunds v. Downes*, 4 Tyr. 173.

The operation of the statute of limitations will not be barred by a written acknowledgment of a pre-existing debt, unless a fresh promise to pay can be inferred from the terms used; and therefore where a letter from the defendant denied his liability to pay the plaintiff's claim, and contained no acknowledgment of its validity, though it pointed out a time for communicating personally with the plaintiff, it was holden that it did not take the case out of the statute. *Brigstocke v. Smith*, 3 Tyr. 445.

It is not necessary that the acknowledgment should state the amount of the debt; extrinsic evidence is admissible to prove that. *Lechmere and others v. Fletcher*, 3 Tyr. 450.

There is an exception in the statute of actions upon accounts concerning "the trade of merchandize between merchant and merchant, their factors or servants." This however extends only to cases where there are mutual accounts and reciprocal demands, Bul. N. P. 149, 150. Peake, 121, and where the accounts are still open and running; Jen. 401. 4 Mod. 106: 1 Vern. 456. 2 Id. 655. 2 Saund. 127. 2 Vez. 400, and see 1 B. & Ad. 15; and not to cases where the account has been stated and the balance struck. 1 Sid. 465. 1 Mod. 70. 1 Vent. 89. 1 Lev. 298, nor to cases where the items are all on one side. Bul. N. P. 149, 150. If any of the items in such an account be within six years of the commencement of the action, it is immaterial whether the parties are merchants or not, because such item is deemed equivalent to a subsequent promise reviving the debt; 6 T. R. 189; but if none of the items be within six years, it is necessary that the parties be merchants, and the account relate to the trade of merchandize, to bring it within the above exception. 2 Saund. 123, 127 d. Where the case does not come within this exception in the statute, yet if any of the items be within six years, the plaintiff shall recover for them, although not for the others. 1 B. & Ad. 15.

In assumpsit, the effect of the statute is to take away the remedy, but it does not otherwise affect the debt or other contract. See 2 B. & Ad. 413. And therefore a subsequent promise to pay, at any time within six years before the commencement of the action, has the effect of reviving the debt, and has always been holden sufficient to support the action; for as the original cause of action is still subsisting, it is equally a sufficient consideration for the subsequent promise as for the original one. In the same manner, any acknowledgment or admission that the debt is unpaid, from which a promise to pay may reasonably be implied, will be equivalent to an express promise, and will equally support the action; and upon a general *acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied. *Per Cur.*, in *Tanner v. Smart*, 6 B. & C. 603, 609. But, on the other hand, where the party guards his acknowledgment, and accompanies it with an express declaration to prevent such an implication, in that case the acknowledgment will have no effect in reviving the debt; and therefore where the acknowledgment proved, was "I know I do owe the money, but the bill I gave was upon a threepenny stamp, and I will never pay it," the court held it not to be sufficient to take the case out of the statute; for so far from it raising an implication of a pro-

mise to pay, it was accompanied by a declaration that he would never pay. *A'Court v. Cross*, 3 Bing. 329. In fact, in such cases, the declaration must be deemed to be founded on the subsequent promise, and not on the original one; and if that be conditional or qualified, the plaintiff must wait until the condition or qualification is satisfied, before he commences his action. Therefore where the promise was to pay as soon as he was able, and the plaintiff gave no proof of the defendant's ability, the court held that he could not recover. *Tanner v. Smart*, 6 B. & C. 603. *Haydon v. Williams*, 7 Bing. 163. In this latter case the court said that they would not decide whether a plaintiff in such a case ought not to declare specially on the subsequent promise; but in *Tanner v. Smart*, which is now the leading case upon this subject, Lord Tenterden said, that as soon as the condition or qualification was satisfied, as for instance, where the promise is to pay as soon as he is able, then as soon as his ability can be proved, the promise becomes absolute; and if so, the declaration may be in the same form as upon the original promise. In like manner a promise to pay, sufficient to take a case out of the statute of limitations, may be implied from a payment of interest upon it, 10 B. & C. 122, or of any part of the principal, within six years, either by the defendant himself, or by any person having authority from him to make it. And it has been decided, that if one of several persons jointly liable, pay a part of it, or interest upon it, 10 B. & C. 122. 8 B. & C. 36. 8 Bing. 309. 2 Vent. 151. And see 2 H. Bl. 340, this will take the case out of the statute as against the others. But as soon as the liability becomes severed by the death of one of the parties, then nothing done by the executor of the deceased shall affect the survivors, 1 B. & Ad. 396, and nothing done by any of the survivors will affect the executor of the deceased, 2 B. & C. 25, because at the time of the act done, the liability was no longer joint.

Semb. Part payment will not take a case out of the statute, where the debt to which it is applied consists of several items. *Brigstocke v. Smith*, 3 Tyr. 445.

Where a payment is given in evidence, to take a case out of the statute of limitations, evidence must also be given to satisfy the jury that it was not in discharge of a mere balance due, but a payment intended to be applied to a part discharge of the debt for which the action is brought. *Tippets v. Heane*, 4 Tyr. 772.

Although a parol admission of part payment or payment of interest will not take a case out of the statute of limitations since statute 9 G. 4, c. 14, s. 1, yet if a payment be actually proved, a parol admission of

the party on what account he paid it, is good evidence, notwithstanding that statute. *Waters v. Tomkins*, 1 Tyr. & Gr. 137.

Formerly a parol promise or acknowledgment was sufficient to take the case out of the statute. But now, by stat. 9 G. 4, c. 14, s. 1, (after reciting the stat. 21 J. 1, c. 16, of limitations,) it is enacted, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors or executors *or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactment, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made or signed by any other or others of them. Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of principal or interest made by any person whatever. Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by the said recited Act or this Act, as to one or more such joint contractors, executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgments may be given and costs allowed to the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff." And by sect. 2, "if upon a plea of non-joinder in abatement, and issue joined thereon, it shall appear upon the trial that the action could not have been maintained against the party not joined by reason of the statute of limitations or of this Act, the issue shall be found against the party pleading the same." By sect. 3, no indorsement or memorandum of payment written on a promissory note, bill of exchange or other writing, by or on behalf of the person to whom such payment is made, shall be deemed sufficient proof of such payment, so as to take the case out of the statute. And by sect. 4, the recited Act and this Act shall be deemed to apply to the case of a debt or simple contract alleged by way of set-off on the part of a defendant. It has been decided that if a written promise or acknowledgment, as above mentioned, be lost or destroyed, parol evidence may be given of its contents. 7 Bing. 168.

The action of *account* must be commenced within six years next after the cause of action, unless the account concern the trade of merchandize between merchant and merchant, their factors or servants. 21 J. 1, c. 16, s. 3. What is above stated with reference to *assumpsit* relates equally to this form of action.

The action of debt, if grounded upon any lending or contract without specialty, or if for arrears of rent (not reserved by deed, Hut. 109. 1 Saund. 38. and see 2 Saund. 66,) must be brought within six years after the cause of action. 21 J. 1, c. 16, s. 3. The statute being confined to actions upon a lending or contract *without specialty*, it did not consequently extend to debt upon the st. 2 & 3 E. 6, c. 13, for not setting out tithes, for the statute is a specialty; R. Cr6. Car. 513; nor to debt on an award; Semb. 1 Lev. 273. 1 Sid. 415. 2 Saund. 63, 64; nor to debt for a copyhold fine, for it is not founded upon any contract or lending; 1 Lev. 379; nor to debt upon a tally: Per Windh. 1 Sid. 306, nor to debt for an escape, for it is founded upon the st. 1 R. 2, c. 12, before which an action on the case only lay; R. 1 Saund. 38. R. 1 Lev. 191. 1 Sid. 306; nor to debt against a sheriff, for money levied under a *fieri facias*, R. 2 Mod. 212. 2 Show. 79; nor to debt for a legacy. 6 Mod. 25. Com. Dig. Temps. G. 15. But it extended to debt upon bills of exchange, Carth. 3. 226, and promissory notes; 3 & 4 Ann. c. 9, s. 2; and to debt upon foreign judgments. Per Cur. 2 Vern. 540, and see 10 B. & C. 903. But now, by 3 & W. 4, c. 42, s. 3, actions of debt for rent upon an indenture of demise, debt on bond, covenant, or debt on any other specialty, and debt or *scire facias*, on recognizance, must be commenced either within ten years after the session of parliament 3 & 4 W. 4, or within twenty years after the cause of action; all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced within two years after the cause of action; all actions of debt upon award, where the submission is not by specialty, debt for a fine due in respect of copyhold estates, debt for escape, and debt for money levied on a *fieri facias*, within three years after the said session, or within six years after the cause of action: but nothing in this clause shall extend to any action given by a statute, where the time for bringing such action shall be therein specially limited.

But if the party entitled to such action shall, at the time the cause of action accrues, be within the age of 21 years, *feme covert*, *non compos mentis*, or beyond the seas, or if the party against whom there shall be such cause of action shall at the time be beyond the seas, the action may in those cases be commenced within the times respectively above limited after such disability ceases. 3 & 4 W. 4, c. 42, s. 4.

No part however of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of His Majesty's dominions shall be deemed to be beyond the seas, within the meaning of the above clause. Id. s. 7.

And if any acknowledgment shall be made, either by writing signed by the party liable by virtue of such indentures, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest due thereon, the action may then be brought within twenty years after such acknowledgment; or if at the time of such acknowledgment, the party to whom it is made be under such disability as above mentioned, or the party making it be beyond seas, then within twenty years after the disability ceases; and in reply to a plea of this statute, the plaintiff may state such acknowledgment, and that the action was brought within the time aforesaid. Id. s. 5.

Also, if in any of the said actions judgment be given for the plaintiff, and the same be reversed for error, or if a verdict pass for the plaintiff and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his writ; or if in any of the said actions the defendant be outlawed and shall afterwards reverse the outlawry; in such cases the plaintiff, his executors or administrators, may commence a new action within a year after. Id. s. 6.

And by stat. 58 Geo. 3, c. 127, s. 5, the action of debt for not setting out tithes, must be commenced within six years from the time when such tithes became due.

*The action of *detinue* must be commenced within six years next after the cause of such action. 21 J. 1, c. 16, s. 3.

The action of *trespass quare clausum fregit* and *trespass* for the "taking away of goods and cattle," must be commenced within six years next after the cause of action; and the action of *trespass* for assault, battery, wounding or imprisonment, within four years. 21 J. 1, c. 16, s. 3. Trespass for beating a man's servant, *per quod*, &c. it seems, is not within the latter clause; 1 Salk. 206. 5 Mod. 74. 2 L. Raym. 831; nor is trespass for assaulting and debauching plaintiff's wife, 6 East, 387, this action being always deemed, and treated, as an action on the case, (even although laid *vi et armis*;) and the proper plea being "not guilty within six years." The time limited for the action of trespass for mesne profits, is also six years. Bul. N. P. 66.

The action on the case for words must be brought within two years next after the words spoken. 21 J. 1, c. 16, s. 3. This does not extend to actions for words which are not actionable of themselves without alleging special damage; 1 Sid. 96. T. Raym. 61. Per Twinkl.

1 Sid. 85. Cro. Car. 141. 163. 1 Salk. 206; nor to actions for *scandalum magnatum*. Lit. Rep. 342. 1 Sid. 415; or slander of title; Cro. Car. 141. Ley, 82. Palm, 530. Jon. 196. D. T. Raym. 61; nor to actions for words founded upon an indictment or other matter of record; 1 Sid. 95; nor of course to actions for libel. In all other cases, not within this clause of the statute, the action on the case must be commenced within six years next after the cause of action. 21 J. 1. c. 16, s. 3.

The action of trover must be commenced within six years next after the cause of action. 21 J. 1, c. 16, s. 3; Cro. Car. 246, 333. The time of limitation, in this case, does not begin to run until after the conversion. 7 Mod. 99.

The action of *replevin* must be commenced within six years next after the cause of action. 21 J. 1, c. 16, s. 3. As to the *avowry*, and the time limited for recovering arrears of rent by distress, see under the head "Rent," ante, p. 24.

Actions upon penal statutes for forfeitures, must be commenced within two years after the offence committed, if the forfeiture be limited to the king only; or within one year, if the forfeiture be limited to the king and to any other that shall prosecute in that behalf. 31 El. c. 5, s. 5. Therefore if a common informer bring a *qui tam* action, after a year from the commission of the offence, but within two years, it is bad as to the informer, but good for the king, Cro. Car. 381. Cro. Jac. 366. and see Dalis. 60. But this statute does not extend to actions given by statute to a party grieved; Cro. El. 646. Noy, 71. 3 Leon. 237. 1 Show. 354. Carth. 233; which are now regulated by stat. 3 & 4 W. 4, c. 42, s. 3, by which it is enacted that all actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force, *shall be commenced within two years after the cause of action. See this section and sect. 4. 6. 7. ante p. 28. 29.

The stat. 21 J. 1 c. 16, above mentioned, contains a proviso that if any person entitled to any of the personal actions thereby limited, shall be, at the time the cause of action accrued, within the age of twenty-one years, or a feme covert, *non compos*, imprisoned, or beyond the seas; such person shall be at liberty to bring the same action within the times above limited, respectively, after their coming to full age or being discoverd, of sane memory, at large, or returned from beyond seas. See 2 Mod. 71. Fitzg. 61. Cro. Car. 245. But this statute does not prevent a person labouring under any of the above disabilities from suing at any time during the disability, although after the time limited by the statute; 2 Saund. 121; therefore if an

infant, at any time, bring an action by his guardian, the statute of limitations cannot be pleaded. *Id.* If the plaintiff be in England when the cause of action accrues, the time of limitation begins to run, and is not suspended or affected by his afterwards going abroad. 1 Wils. 134. Or if one of the plaintiffs be abroad, and the others in England the case is not within this exception. 4 T. R. 516. But if a sole plaintiff be abroad, and the defendant reside in the same country, and during their residence there the time of limitation elapse, so that the defendant might have pleaded the statute if the action had been brought in the court abroad, yet to an action brought in this country it will be no plea, the plaintiff being clearly within the above exception. 13 East, 439. The above exception relates to plaintiffs only; but by 4 Ann. c. 16, if the defendant be beyond seas when the cause of action accrues, the plaintiff may bring his action after the defendant's return from beyond the seas, within such times as are limited by the above stat. 21 J. 1, c. 16; and this is not confined to Englishmen who may occasionally go beyond sea, but is general, and extends to foreigners who are constantly resident abroad. 2 W. Bl. 723. 3 Wils. 145. Ireland was formerly deemed *ultra mare* within these statutes; 1 Show. 91; Scotland, of course, not, 1 W. Bl. 286; but now, by 3 & 4 W. 4, c. 42, s. 7, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of his Majesty's dominions, shall be deemed to be beyond the seas, within the meaning of the above statute of James. See also 3 & 4 W. 4. c. 42, s. 4, ante, p. 28.

Suits by the crown.] The king shall not sue any person for lands, tenements or hereditaments (except liberties and franchises,) on any title which has not first accrued within sixty years before the commencement of such suit, unless he have been answered the rents within that time, or that they have been in charge or stood *in super* of record (that is, when they have been adjudged to the king, upon verdict, demurrer, or hearing); and the subject shall quietly enjoy against the king, and all holding under him by patent, &c. 9 Geo. 3, c. 16, s. 1, 10; see also st. 21 J. 1, c. 14.

Actions by and against particular persons.] If a man bring an action within the time limited by law, and die before verdict or *judgment by default, the action abates, and the executor or administrator must bring a new action, if the cause of action survive to him; 2 Arch. Pr. C. B. 306; and if the time of limitation have by that time elapsed, still the executor is allowed a year within which to bring a new action. 2 Salk. 425. 1 Lutw. 260. 1 L. Raym. 434. 2 Str.

907. Fitzg 170, 289. If the testator or intestate died after verdict or judgment by default, no new action is necessary, but the executor or administrator may revive the former action by *scire facias*. 2 Arch. Pr. C. B. 308. But if the cause of action did not accrue until after the death of the testator or intestate, the executor has six years &c. after the cause of action; or an administrator six years &c. after administration granted or cause of action accrued, whichever be latest. See Skin. 555. But in the case of an entry, distress or action for land within stat. 3 & 4 W. 4, c. 27, s. 2, (*ante*, p. 28,) an administrator shall be deemed to claim, as if there had been no interval of time between the death of the intestate and the grant of the letters of administration. *Id.* s. 6.

If a sole defendant die before verdict or judgment by default, whereby the action abates, yet if there be no executor or administrator against whom the plaintiff can bring a new action, he shall not be prejudiced by the statute of limitations. 2 Vern. 695.

Actions against justices of peace, for any thing done by them in the execution of their office, or against constables, headboroughs or other persons acting by their orders or in their aid, must be commenced within six calendar months after the cause of action has accrued. 24 G. 2, c. 44, s. 8. See 2 Arch. Pr. C. B. 156. Peake, 35. 9 East, 364. 12 East, 67. 14 East, 491. There are many other statutes which regulate this subject in particular instances.

Actions against officers of excise or customs, for any thing done by them in the execution of their duty, must be commenced within three months after the cause of action has accrued. 28 G. 3, c. 37. See 2 Arch. Pr. C. B. 156. 5 T. R. 1. 1 B. & P. 187. 2 H. Bl. 14. 2 East, 254.

Actions, after a former judgment reversed.] If in personal actions judgment for the plaintiff be reversed for error, or judgment be arrested after a verdict for plaintiff, or if the defendant be outlawed, and the outlawry be reversed (by plea or writ of error, &c. Cro. Car 294, 295,) the plaintiff may commence a new action within one year afterwards. 21 J. 1, c. 16, s. 4. And by 3 & 4 W. 4, c. 42, s. 6, the same provision is made with respect to debt, covenant, and the other actions within that statute, as already mentioned, *ante*, p. 29. But there is no provision of this kind concerning actions, &c. for land, within the 3 & 4 W. 4, c. 27, s. 2.

Actions, after a former writ abated.] If an action abate by the death of the plaintiff, we have seen (*ante*, p. 31,) that the executor or administrator, is allowed a year to bring a new action; if by the death of the defendant, the plaintiff shall be allowed a reasonable time to commence

a new action against the executor or administrator. So, if an action abate by the marriage of a feme sole, plaintiff, the husband and wife shall be allowed a reasonable time to commence a *new action, although the time of limitation have elapsed; Willes, 250, n. E; and perhaps a year would be deemed a reasonable time, in analogy to 21 J. 1, c. 16, s. 4, above mentioned. Probably also the same indulgence would be allowed in all other cases of abatement.

Actions removed by Habeas, &c.] If a man commence a suit in an inferior court, and the time of limitations expire, and afterwards the action be removed into one of the courts at Westminster, and the plaintiff declare there *de novo*; if the defendant plead the statute of limitations, the plaintiff may reply the suit below, and show that it was commenced within the time limited, &c. 2 Salk. 424. 2 Str. 719. 2 L. Raym. 1427.

†CHAPTER IV.

WHO MUST BE MADE PARTIES TO AN ACTION.

SECT. I.—PLAINTIFFS.

1. *By whom the Action is to be brought.*

It may be necessary to premise that legal remedies are reserved for injuries to legal rights only; for injuries to merely equitable rights, redress may be had in a court of equity. Therefore a *cestui que trust* cannot recover in ejectment, but the action must be brought upon the demise of the trustee; 2 T. R. 684. 7. T. R. 47. 8 T. R. 2, 122. 1 H. Bl. 447. 2 B. & P. 219. 1 T. R. 735. 8 East, 248; unless the trust be satisfied, and the term raised for that purpose can be presumed to have been surrendered. 2 T. R. 684. 1 T. R. 759, n. So a mortgagor cannot maintain an ejectment, having but a mere equitable title, the legal title being in the mortgagee. See 1 T. R. 759, 755. So a *cestui que trust* of a reversion, cannot maintain covenant against the lessee, upon a lease made by a former owner of the reversion. See 1 B. & P. 67. Also, a *cestui que trust* cannot in general maintain any action against his trustee for a breach of trust, the remedy in such case being by bill in equity; 2 Atk. 612. but see 1 Eq. Ca. Abr. 384. Pr. Ch. 200; even if a trustee receive money for a *cestui que trust*, and refuse to pay it over, he cannot in

general be sued in a court of common law for it in an action for money had and received. Holt, N. P. C. 641. But where money in litigation between two parties, was by mutual consent paid over to a person in trust for the party entitled, the court held that the party ascertained to be entitled to it might maintain an action for it against the trustee. 9 East, 376. So where a person held a bill of exchange in trust for another, and having commenced an action upon it, became bankrupt; afterwards, the sheriff having allowed the defendant to escape, the assignees brought an action for the escape, and recovered damages to the amount of the bill; the court held that the person for whom the bankrupt held the bill in trust might maintain an action for money had and received against the assignees, for the amount of the damages thus recovered by them, allowing to them the costs and expenses. 1 M. & S. 714. So, in the common case of money deposited with a stakeholder, it can be recovered from him in an action for money had and received, by the party entitled to it. 13 East, 20. 5 T. R. 405. 3 Taunt. 277. 4 Taunt. 474.

*The other necessary observations upon this subject will be found under the following heads.

Joint-tenants, &c.] One joint-tenant or tenant in common, or his executor, &c. may have an action of account against the others as bailiffs, for receiving more than their proportion of the profits of the estate. 4 Ann. c. 16. and see Co. Lit. 172 a, 186 a, 200 b. 3 Leon. 226, F. N. B. 118. So, one joint-tenant or tenant in common may maintain ejectment or other action against the others, if they eject him or withhold the possession from him; Co. Lit. 199 b; but it must be an actual disseisin, such as turning him out, hindering him to enter, &c.; a bare perception of the profits is not sufficient. 1 Salk. 392. 7 Mod. 39. 1 East, 568. See 2 Bur. 1895. In trespass against B. C. and D. for turning A. out of his house, and keeping the house and goods from him, it was holden to be no plea to say that A. had nothing in the said house and goods but jointly and undividedly with D. 2 New Rep. 188. But for a mere entry upon the premises, without an ouster, no action of trespass will lie. Lit. s. 323. Th. Dig. l. 11, c. 30, s. 6. 1 Salk. 4. Skin. 6. And also where there are two joint-tenants or tenants in common of a personal chattel, such as a horse, a hawk, &c. and one of them seizes it for his own use solely, the other has no remedy by action. Lit. s. 323. Co. L. 200 a. 1 T. R. 651. Therefore if one of two partners become bankrupt, his assignees cannot maintain trover against the solvent partner or his executor for any of the partnership goods, 1 East, 363, nor against any other person to whom the solvent partner may have given or delivered them; 1 East, 363; because in these cases the solvent part-

ner, his executor, and the person to whom he delivered the goods, respectively, were, as to these goods, tenants in common with the assignees of the bankrupt. But if a joint-tenant or tenant in common destroy the goods, &c.—as if there had been two tenants in common of a park or dove house, and one of them destroy all the deer, or take all the old doves and destroy the flight, the other may undoubtedly maintain trespass against him. Co. Lit. 200, a, b. And where one tenant in common of a ship, took it away and sent it to the West Indies, where it was lost in a storm, this was holden to be evidence of a destruction, and the other tenant in common recovered against him in an action for his moiety. Bul. N. P. 34, 35. So, one joint-tenant or tenant in common may maintain trespass for mesne profits against the other, after a recovery in ejectment; 3 Wills. 118; for although not within the words, it is within the equity of the stat. 4 Ann, c. 16, above mentioned. So, if a husband and wife and A. be tenants in common, and the husband die, and his wife sue dower against the heir before partition, it is no plea that he is tenant in common with A. and the demandant. R. 3 Lev. 84. So, when two are seised of a house or mill as tenants in common or joint-tenants, and one be willing to repair it, he may have a *writ de domo reparanda* against the other. Co. Lit. 200 b. As to the joinder of joint-tenants and tenants in common, in actions by them against strangers, see post.

One parcener cannot sue the other in account, the statute allowing joint-tenants and tenants in common to do so, being strictly *confined to them. See Co. Lit. 200 b. 2 Inst. 403. Nor can one parcener sue the other in any other form of action, unless for an actual disseisin or the like.

Partners being in fact joint-tenants, may sue each other in account, as above mentioned, but in general in no other action. It has been holden, however, that one partner may maintain an action for money had and received against another, for money received to the separate use of the former, and wrongfully carried to the partnership account. 2 T. R. 476. So where A. and B. joined in the purchase of goods for their joint profit, to be paid for by the bills of A., and B. agreed to furnish A. with his moiety of the amount in time for the payment of the bills; the Court held that A. might maintain an action against B. for such moiety, notwithstanding there might be an account to be taken between them as partners upon the subsequent disposal of the joint stock. 13 East. 7. So, after the dissolution of the partnership, they may sue each other in the same manner as if they had never been partners, whether the partnership be dissolved by agreement, see 2 T. R. 479, or by bankruptcy, see 1 East. 20, or by lapse of time, provided

they are not hindered from doing so by some clause in their articles of partnership.

Also, one or two joint contractors can never sue the other for a non-performance of the contract. Thus where A. and B. brought *assumpsit* as executors against C., and C. pleaded in bar that the promises were made by him jointly with B., the plea was holden good on demurrer. 2 B. & P. 124, n. Consequently if a partnership consisting of A. B. and C. have a cause of action against another consisting of C. D. and E., the former cannot maintain an action against the latter; 6 Taunt. 597; and for this reason: because either C. must join in an action against himself, which would be absurd, or there would be a nonjoinder either of plaintiffs or defendants, which would be fatal.

As to the joinder of joint-tenants, tenants in common, parceners, partners, or joint-contractors, respectively, in actions by them against strangers, see post, p. 45, *et seq.*

Baron and Feme.] A man cannot sue his wife or a woman her husband, in any form of action whatever, for reasons sufficiently obvious. See 17 ed. 3. 20. b. 1 Brown. Ent. 63. And even if one have a cause of action against the other before marriage, their subsequent intermarriage is a release of the action.

As to their actions against strangers: In all real actions for the lands of the wife, the husband and wife must have joined; R. 1 Bulst. 21; so, they must have joined in a writ of waste, Sav. 111, and in a right of ward. Ow. 83. Com. Dig. Baron. and feme. These actions, however, are now abolished. Ante, p. 7. But in a *quare impedit*, upon an avoidance during coverture, the husband must sue alone. 1 Rol. 347. l. 30. Per Dy. Ow. 82. Co. L. 351 a. Per two J. Lit. 13. Dub. Lit. 374. Acc. 1 Brownl. 159. 2 Bulst. 14.

In personal actions for a *chose in action* due to the wife before coverture, they must join: as, in debt on bond or specialty made to *the wife before coverture; 1 Rol. 347. l. 53. D. Ow. 82. Cro. El. 537; or debt for rent due before coverture, upon a lease for years, Cro. El. 700, or upon a lease for life, 1 Rol. 348, l. 8, or upon a lease at will. Co. Lit. 55, b. So, in debt for arrears upon an account, 1 Rol. 348, l. 5, and in *assumpsit* upon a promise to the wife before coverture, 1 Sid. 25, or for the labour of the wife *dum sola*, they must join. Also, in an avowry for rent due before coverture, upon a lease for life or years, they must join. 1 Rol. 348, l. 8, 347, l. 50. Also in actions *ex delicto* for injuries to the wife or her property before marriage, the husband and wife must join: thus in an action for stopping a way to the wife's land before marriage, R. Cro. Car. 419, or in trover, upon a conversion of the goods of the wife before marriage, they must join. Com. Dig.

Baron and Feme V. see 10 Mod. 25. So, in trespass for an injury done to the property of the wife *dum sola*, they must join. 3 T. R. 627. But in trover, where the goods were lost before marriage, and the conversion was after, the husband and wife may join, 1 Sid. 172. 1 Vent. 261. 2 Lev. 107, or the husband may sue alone. Per Hale, 1 Vent. 261. 2 Lev. 107. Per two J. 1 Sid. 172. So, in rescous of a distress for a rent charge due before coverture, the husband alone may sue, for it is wrong to him; or the husband and wife may join. R. Cro. El. 459. Mo. 422. So where a bill of exchange was payable to a feme sole, who intermarried before the same was due; it was holden that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill; 1 Barn. & Ald. 218: or the husband and wife might have joined in the action.

Secondly, Where the cause of action arises *during coverture*. 1. It is very clear that for injuries to the husband or his property, the action must be brought by the husband alone.

2. For any matter relating to the land which the husband has in right of his wife, the husband and wife may join, or the husband may sue alone. Thus in an action of trespass for a trespass upon the wife's land, during coverture, the husband and wife may join, Dub. 2 Vent. 195. [R. Bunb. 277,] or the husband may sue alone; 2 Vent 195. 1 Rol. 347, l. 40. R. 1 Bulst. 21. Jon. 376. In trespass for cutting down trees belonging to the wife, during coverture, the husband, and wife may join, see 1 Rol. 348, l. 18, or the husband may sue alone. Adm. 2 Vent. 195. So in an action for forcible entry upon, or detainer of the wife's land during coverture, the husband and wife may join, 1 Rol. 348, l. 20. Mo. 5, or the husband may sue alone. 1 Rol. 347, l. 27, 28. So, an action on the case against a lessee for years, for burning his house, where the husband has it for the life of his wife, may be by the husband alone, Dub. Cro. El. 461, 2, or by the husband and wife. So an action on the case for cutting down trees, the loppings of which were reserved to the wife for her life, may be by the husband alone, Semb. Cro. Car. 438, or by the husband and wife. R. Cro. Car. 438. So, in an action on the case for stopping a way to the wife's land, they may join, R. Cro. Car. 419, or the husband may sue alone. So for inclosing land in which the wife has common [see 2 Bulst. 14,] or for not grinding at the wife's mill [see 1 Wils. 224,] they may join, or the husband may sue alone. So, in debt on stat. 2 & 3 Ed. 6, b. 13, *for not setting out tithes which the husband has in right of his wife, they may join, R. Cro. El. 608, 613. R. 1 Jon. 325. R. Mo. 912, or the husband may sue alone. Jenk.—So, if a woman lease for years, rendering rent, and afterwards marry, the husband and wife may sue

for rent due after the coverture, or the husband alone may have an action of debt for it. Palm. 207. So, if the demise were by the husband and wife after coverture, an action for rent may be brought by the husband alone, Semb. 2 Bulst. 234. Per Yelv. acc. Fleming, contra, 1 Bulst. 21. acc. Lit. 13, [or by the husband and wife. 1 Str. 229.] So an avowry for rent of the wife's lands, accrued during coverture, may be by husband and wife, 1 Rol. 318, l. 30; 347, l. 51. see Win. Ent. 952, or by the husband alone. Semb. 1 Rol. 318, l. 35. R. 2 Cro. 442. Per Twisd. 1 Mod. 273. Clift. Ent. 343, 4. see 1 Bro. Ent. 244. So in an action for a rescous, after coverture, of a distress for a rent charge due before coverture, the husband alone may sue, or he and his wife may join. R. Cro. El. 459; Mo. 422. But in debt for rent, upon a lease by the husband and wife, after the term expires, R. 2 Bulst. 234. R. 1 Bulst. 21, or upon a demise by the husband alone, though the term continue, [it seems] the husband must sue alone. In detinue of charters of the wife's inheritance, husband and wife may join, 1 Rol. 347, l. 49, [or the husband, it should seem, may sue alone.] So, in trespass for taking charters of the wife's inheritance, 1 Rol. 347, l. 32, or for forging false deeds of the wife's inheritance. 1 Rol. 347, l. 34, the husband may sue alone, [or, it should seem, husband and wife may join.] Com. Dig. Baron and Feme, VWX.

As the personal property of a woman becomes vested in her husband instantly upon her marriage, and as personal property acquired by her afterwards vests also immediately in the husband, he alone can bring an action for any injury to it during coverture; she cannot even join in the action. Thus, a husband and wife cannot join in an action of trover, and declare that they were both possessed of certain goods, and that the defendant converted them, to their damage. Yelv. 165, 166. 1 Salk. 114. So, if tithes belonging to the wife's rectory be taken away, after being severed from the nine parts, the husband alone shall maintain trover for them. Jon. 325. But where goods belonging to a woman are lost before marriage, and the conversion takes place after, the husband and wife may join in trover for them, although the conversion alone is the cause of action; 1 Sid. 172. 1 Vent. 261. 2 Lev. 107; or the husband may sue alone. Per Hale, 1 Vent. 261. 2 Lev. 107. Per 2 J. 1 Sid. 172.

Also, as all benefit from a promise or other contract to the wife, express or implied, during coverture, belongs to the husband, he may bring an action on it in his own name. Thus, he may sue alone in assumpsit for the labour of his wife during coverture; R. 4 Mod. 156. R. 1 Salk. 114; or in debt on a bond made to the wife after marriage. R. 3 Lev. 403. D. Lit. 13. And the same, where the contract is with

husband and wife jointly: thus, upon a covenant to husband and wife in an indenture between them of the one part and A. of the other, the husband may declare as upon a covenant to himself. R. 2 Mod. 217. So, where a reversion after a *lease made, is granted to husband and wife, he may maintain debt for rent in his own name alone. R. 2 Bulst. 234. But although the husband in these cases may sue alone, yet where the contract is made with husband and wife jointly, they may join in the action. [See 1 Wils. 224: 1 Str. 230.] Thus, after an assignment to both, they may join in covenant as assignees, R. 1 Rol. 348, l. 25. Jon. 406, 7. Cro. Car. 505. 2 Cro. 399. 3 Bulst. 164, or the husband may sue alone. R. 2 Cro. 399. 3 Bulst. 164. 1 Rol. 360. So, upon a promise to pay 8*l.* per annum to husband and wife during coverture, both may join, or the husband may sue alone. [So, if it be referred to a master in chancery to take an account of what is due to husband and wife, who reports the sum due, and appoints it to be paid to the husband; and the defendant, being committed for non payment escape: husband and wife may join in an action for the escape, 2 Str. 726, or the husband may sue alone.] So, if the contract be with her alone, yet if she be the meritorious cause of action, she may join, or the husband (as we have seen) may sue alone: thus, in assumpsit for a cure performed by the wife after coverture, the husband and wife may join, R. 2 Cro. 77, 205. 1 Sid. 25. R. 1 Salk. 114. Per Dodr., 2 Rol. 250, or the husband alone may sue. Semb. 2 Cro. 77, 205. Per Glin. 2 Sid. 128. So, upon a bond to the wife after marriage, husband and wife may join in the action, Lit. 13, Semb. 1 Ver. 396, or the husband may sue alone. 2 Mod. 217. 1 Ver. 396. Lit. 13. [So, upon a promissory note made to the wife during coverture, husband and wife may join in the action, 2 M. & S. 393, or the husband may sue alone. So, for a legacy left to her during coverture, both may join, 1 H. Bl. 108, or he may sue alone. So, in an action upon a covenant to her, for rent of land which is her inheritance, they may join, or the husband may sue alone. 1 Str. 229.] So, if there be an award to pay so much to the husband, and so much to the wife, they may join in an action for the money awarded to the wife, or the husband may sue alone. Lit. 13. So, if a cause of action arise out of an action by or against husband and wife, both may join in it: as in an action for champerty or maintenance in a suit against husband and wife, both may join, or the husband alone may sue. 2 Inst. 563. So, in a *decies tantum* for embracery in an assize against husband and wife, both may join, or the husband alone may sue. 1 Rol. 447, l. 42. So, it seems, a *scire facias* to revive a judgment by husband and wife, may be brought in the name of the husband alone; 3 Lev. 403; [but it would be much better that

the *scire facias*, in such a case, should strictly pursue the judgment.] But where the immediate consideration for the promise proceeds from the husband alone, although the wife be the meritorious cause of action, the wife should not join in the suit: thus, upon a promise to the husband; in consideration of forbearance to sue, to pay a debt due to the wife *dam sola*, the action must be by the husband alone. Per 2 J. Yelv. cont. 2 Cro. 110. Com. Dig. Baron and Feme, VWX.

In an action for torts to the wife, husband and wife must join: as for a battery of the wife; R. Yelv. 89. 1 Brownl. 205. 1 Rol. 360. 2 Cro. 501, 528. Adm. Cro. Car. 90; or false imprisonment of the wife; 1 Salk. 119. Semb. Lane, 53, 54; or for maliciously indicting the wife. Jon. 440. [And where an action was brought by *some women, dippers at Tunbridge Wells, jointly with their husbands, against a person who disturbed them in the exercise of their employment as dippers, the court held that their husbands were properly joined as plaintiffs. 2 Wils. 414.] But if the husband have received a special damage from the injury done to his wife, the action may be brought by the husband alone: as for battery of the wife, *per quod consortium amisit*; R. 2 Cro. 501, 502. Jon. 440. 2 Rol. 556, l. 40. R. 2 Rol. 51. see 1 Salk. 119; or for carrying away the wife, *per quod*, &c.; R. 2 Cro. 538. R. Cro. Car. 90; [or for a malicious prosecution of the wife, *per quod* they were both scandalized, and the husband put to expense; 2 Str. 977, Hardw. 54;] or for words spoken of the wife, whereby the husband sustained a special damage. 1 Salk. 206; R. 1 Lev. 140. 1 Sid. 346. And where the wife lived separate from the husband, and carried on a trade, and an action was brought in the names of husband and wife for words spoken of the wife, laying special damage with respect to the business, the court held that as the words were actionable only in respect of damage as to the business, and that damage being in law the husband's only, the wife ought not to have been joined. 4 B. & Ad. 514. So, where the injury to the wife is added in a declaration for a trespass, &c. merely in aggravation of damages, the action must be brought by the husband alone. 1 Str. 61. Fort. 377. [Also, the wife cannot join in an action for a joint injury to the husband and wife. See Jon. 440.] Yet, for a wrong founded upon one entire record against both, as in an action in nature of conspiracy for maliciously indicting husband and wife, they may join, Per Croke, Cro. Car. 553. Jon. 440, or the husband may sue alone. Semb. Cro. Car. 553. And the same for a malicious presentment in the Spiritual Court. Semb. 2 Cro. 355. Com. Dig. Baron & Feme, VWX.

In all cases where a wife has a cause of action as executrix, the action must be brought by husband and wife, and not by the husband

alone. And where a debt due to the wife's testator was paid to A. for the wife, without an express direction of the husband, the court held that the husband alone could not sue A. as for money received to his use. R. 1 Salk. 282. Com. Dig. Baron & Feme, V. But in all cases where an executor may sue in his own right, husband and wife, (executrix, &c.) may join, or the husband may sue alone. Thus, upon a bond given to husband and wife, administratrix, it was holden that the husband might declare upon it as a bond made to himself; 4 T. R. 616; or the husband and wife might have joined in the action. So, assumpsit lies by the husband alone, upon a promise to him to pay a debt due to the wife as executrix, in consideration of his forbearance to sue. R. 1 Salk. 117. Carth. 462.

But if the husband be banished, Co. Lit. 132, b. R. 4 Mo. 851. 2 H. 4 7. a. R. 2 Ver. 104, 105, or have abjured the realm, Co. Lit. 132 b. 132, a, the wife may sue as a feme sole. The husband's merely being in a foreign country, however, will not give her that privilege. 11 East, 301. See 1 New Rep. 80. If they be divorced, 39 Ed. 3. 32. 25 Ed. 3. 39. b. [82.] 6 Ed. 3, 249. Th. D. l. 12. c. 13, even *a mensa et thoro* only, D. Mo. 666, the wife may sue as a feme sole; but their living apart under articles of separation, even although she have a separate maintenance, will not have that effect. 8 T. R. 545, see 9 East, 470, but see 1 Str. 79, cont.

*If a feme sole commence an action, and afterwards before verdict marry, the defendant may plead the coverture in abatement; Th. D. l. 12 c. 12. Ast. Ent, 9, 10. Vad. M. 68; [6 T. R. 265.] and the same if one of several demandants or plaintiffs marry. Th. D. l. 12, c. 12. s. 2. But no advantage can be taken of it if the marriage took place after judgment, 11 H. 4, 48 b. 21 Ed. 4, 87. [73.] Th. D. l. 12. c. 12. s. 6, or even after verdict and before the day in banc; 4 H. 4, 1. 1 Sid. 143. Th. D. l. 12, c. 12. s. 5. Com. Dig. Abatement, H. 42; but judgment should be entered up in the name of the feme sole, and then revived by a *scire facias* in the names of husband and wife, before execution. See 2 Arch. Pr. C. B. 83.

Nonjoinder or misjoinder of husband and wife may be taken advantage of, in the same manner as nonjoinder or misjoinder of plaintiffs in other cases, which shall be fully stated in a subsequent part of this section. See post; and see Com. Dig. Abatement, E. 6. H. 42. Baron & Feme, Y. Hardw. 119. 3 T. R. 627. 2 New Rep. 405.

Master and Servant.] A servant may maintain an action against his master, for his wages, as in all other cases of contracts. So, an agent may maintain an action against his principal for a remuneration for his agency, either upon an express contract or upon a *quantum meruit*, to

be ascertained by the custom of the trade or calling in which he acted. So a deputy may maintain the like action against the principal officer by whom he is appointed, for his salary, if by the rules or custom of the office or by any express agreement such salary be payable by the principal.

And on the other hand, the master or principal may maintain an action against the servant, agent or deputy, respectively, for any injury he may receive through the negligence or culpable misfeasance of such servant, &c. If a servant, who drives his master's cart, suffer the cattle to perish by his negligence, the master may maintain an action against him. 7 H. 4, 14. Bro. Action sur Case, 34. If a merchant's servant take his master's goods from on board a ship, before they have paid duty, whereby they are seised and become forfeited to the crown, the merchant may maintain an action or the case against his servant. 1 Ro. Abr. 105. Cro. Jac. 265. Lane, 65. So if goods consigned to a factor for sale, be seized as forfeited on account of a false entry of them by the factor at the custom-house, the consignor may maintain an action against the factor for the damage he has thereby received, unless the factor have been led into the error by the invoice or letter of advice. Molloy, 423. Cro. Jac. 265. Lane, 65. So, if A. employ B. to go to the Indies for him, and B. covenant that neither he nor his servants shall import calicoes from thence; and afterwards C., the servant of B., although informed of the covenant, imports certain calicoes, &c.: an action lies by B. against C. 1 Sid. 298. 1 Lev. 188. 2 Keb. 88. So if a man deliver a horse to his servant to go to market, or a bag of money to carry to London, and he neglect to do it, the master may maintain account or detain against the servant. 21 H. 4, 14. Moor, 248. So a principal may maintain account against his factor or agent. 2 H. 4, 12. b. Co. Lit. 90 b. 172 a. 11 Co. 90 a. F. N. B. 117. 2 Ro. Abr. 161. Also where goods are consigned to a factor on *commission, the law implies a contract upon his part to account for such as are sold, to pay over the proceeds, and to redeliver the residue unsold, on demand; and consequently the principal in such a case may maintain assumpsit against the factor. 1 Taunt. 572. 1 Salk. 9. Carth. 89. Comb. 149. So, if he have covenanted to account, &c. the principal may maintain covenant on the deed; 1 Ro. Rep. 52. 2 Bulst. 256; or, if he have given a bond, conditioned to account, &c. debt will lie on the bond, or account, at the election of the principal. 1 Ro. Abr. 118. Dy. 20. Cro. El. 644. So in all cases where an attorney or other agent causes a damage to his client or principal, by gross negligence, he is liable for such damage, in an action of assumpsit or on the case. See 1 Arch. Pr. C. B. [9] 23. 1 M. & S. 52. But if a servant be robbed of money, given him by his

master to carry, the master shall not have any action against him for it, 8 Co. 84. So, where a man sent his servant to receive the amount of a cheque at his bankers, but the servant, instead of going to the bankers, obtained the amount of the cheque from J. S. : and the banker failed the day after, before the cheque was presented : the court held that the servant was not liable for the loss. 10 Mod. 109. So where bills were sent to a banker in London for the purpose of presenting for payment, and he gave them up to the acceptor upon receiving a cheque upon a bank for the amount, which cheque was afterwards dishonoured ; the court held that he was not liable in an action for negligence in having done so. 6 T. R. 12.

Secondly, as to their actions against strangers : if a debtor of the master settle an account with the servant, and promise him to pay the balance, the master may maintain an action on such promise. Godb. 369, 361. So, upon all contracts made with the servant upon his master's account, the master may maintain the action. Ibid. If a servant purchase goods for his master, which are afterwards taken out of his possession and converted by a stranger, the master may maintain trover for them against the stranger ; for the possession of the servant is the possession of the master. Cro. El. 638, 661, 746. So, if a servant be cheated of his master's money, the master may maintain an action against the person who cheated him. 1 Ro. Abr. 98. Cro. Jac. 223.

And where a merchant's clerk made illegal insurances in the lottery, with money he had embezzled from his master, it was holden that the master could recover this money from the lottery office keeper, in an action for money had and received. Cowp. 197. So, if a servant be robbed of his master's money, the master may maintain an action against the hundred. 4 Mod. 303. See also Stanf. 60. Bro. Appeal, 92. Latch. 127.

The master may maintain an action against any person who entices or takes his servant out of his service, 21 H. 6, 31, 18. 2 H. Bl. 511. 1 Salk. 380. 2 Ld. Raym. 1116. Cowp. 54, or who retains him after notice, Noy, 10, 106. 1 Leon. 240. 2 Lev. 63. Keilw. 190. 6 T. R. 221, whether the servant be apprentice, 7 T. R. 745. 5 East, 39, or journeyman, Cowp. 54., or have served in any other capacity. Or, in the case of an apprentice, the master may waive the tort, and bring assumpsit against the person employing him, for the value of the work or labour of his apprentice, or for the amount of the wages earned by him ; 1 Taunt. 112. 5 East, 39, n. 1 Salk. 68. 6 Mod. 69. 12 Mod. 415. MS. M. 1814. 3 M. & S. 191. ; *and even where an apprentice went into the king's service, it has been decided that the master was entitled to his prize money. Per Le Blanc, J., in Foster and Stuart, M.

1814, MS. 3 M. & S. 191. So, a master is entitled to the benefit of any contracts his apprentice may make for himself, and to all property acquired by his labour. &c. during his apprenticeship; but this is not the case with the contracts or property of hired servants. See Co. Litt. 117 a. For a battery or other personal injury to the servant, the master may maintain an action, 1 And. 13. 9 Co. 113. 10 Co. 131. Styl. 94. 2 Bulst. 198. 1 Sid. 175. Cro. Jac. 618. 1 Ro. Rep. 393, provided he have thereby lost the service of the servant, 2 Ro. Abr. 682, for any time, however short; but if the servant be killed, the master has no remedy, the private injury being merged in the public crime. Yelv. 89, 90. Browl. 205. 2 Ro. Abr. 568. 1 Salk 11. So, if a master lose the service of his servant, through the negligence or want of skill of the surgeon or physician who has undertaken his cure, he may maintain an action against the surgeon or physician. 1 Ro. Abr. 98. 1 Ro. Rep. 124. 2 Bulst. 332. Or if he lose the service of a female servant, by reason of her seduction, he may maintain an action against the seducer; Peake, 55.; upon which ground it is, that a parent now recovers damages for the seduction of his daughter, the action in such a case not being maintainable unless laid with a *per quod servitium amisit*. 5 East, 47, n. and see 5 East, 45. 2 T. R. 167.

But although the master may maintain an action for a personal injury to his servant, yet the servant is not thereby precluded from bringing an action and recovering damages for the same injury. If a servant be robbed of his master's property, either master or servant may bring an action against the hundred. 4 Mod. 303. See Stamf. 60. Bro. Appeal, 92. Latch. 127. A mere servant, however, who has no interest in the contract to his master, cannot maintain an action for the non-performance of it, although it be made to himself (as servant to his master) by name. 8 B. & P. 147. Nor can a mere servant maintain trespass or trover for goods of his master taken out of his possession, or an action for any injury to them in his possession, if he have no interest in them: for they are in law considered to all intents and purposes as in the possession of the master.

If an agent in this country make a contract for a person beyond sea, the agent may sue for the non-performance of it; as if a factor here sell goods for a person beyond sea, he may sue for the price of them. Bul. N. P. 130. So, in all other cases where a factor sells goods upon commission, he may sue for the price of them, although his principal be in this country. Id. As a factor's sale, however, creates a contract in law between the principal and the buyer, the principal, by notice to the buyer, may prevent the price from being paid to the factor, and may maintain an action for it, Cowp. 255, even although the factor sold

upon a *del credere* commission. 2 Str. 1182. So, where goods are sold by auction, an action for the price of them may be brought either by the auctioneer, 1 H. Bl. 81, or by the owner. So, the action upon a policy of insurance may be brought either by the person in whose name it was effected, or by the person actually interested. Park, 403. But where an agent, having received several sums of money for A., B., and C., paid the gross *amount into the bank of D., it was holden that A. could not maintain an action against D. for his portion of the money so lodged with him; 1 Marsh. 132; although had A's portion been lodged separately with D., it would have been otherwise. Also it seems, that where a factor deals with the buyer as if the goods were his own, and conceals the name of his principal, if an action be afterwards brought by the principal for the price of them, the buyer may set off a debt due to him by the factor. 7 T. R. 360 n., but see *Escot v. Mihvard*, Co. B. L. 456, contra. If a broker, on the contrary, sell the goods of his principal, and the principal bring an action for the amount of them against the buyer, the latter cannot set off a debt due to him by the broker; 2 Barn. & Ald. 137; for a broker and a factor are very different persons; the latter is intrusted with the possession of the goods, and may sell them without disclosing the name of his principal; the former has not the possession of the goods, but is entrusted merely to make the contract between the seller and the buyer, for which he receives a certain remuneration, and is not otherwise interested. Id. As to injuries to goods, &c. in the hands of an agent or factor, who is interested in them to the extent of his commission or brokerage, he is deemed in law to have a special property in them, and may maintain trespass or trover against a stranger who takes them from him, or trespass for any forcible injury to them whilst in his possession, in the same manner as a bailee; or the action may be brought by the principal. But where goods are shipped, consigned to an agent, an action against the captain of the ship, for negligence in stowing them, 2 New Rep. 411, or an action of trover for them, 4 East, 211, must be brought by the principal, and not by the agent.

But in the case of officer and deputy, where the principal is legally responsible for the deputy, for all causes of action arising to them in relation to their office, the action must be brought in the name of the officer and not of the deputy, even although the deputy be in fact entitled to any damage, &c. which may be recovered. Thus an action upon stat. 29 Eliz. c. 4, for fees, must be brought in the name of the sheriff, and not in that of his bailiff. 2 T. R. 155—158.

A master of a ship is not considered in law as a mere servant, but may bring an action for freight, or upon any other contract made with

him on account of the ship. 6 Taunt. 65. So, he may maintain trespass for detaining the ship, 1 Salk. 10. 1 Ld. Raym, 558, or any other action, it should seem, which can be maintained by a bailee.

And lastly, in the case of bailment, as where goods are deposited with a person to keep, or given to a carrier to carry or pledged for a sum of money, or distrained for rent, &c. or if clothes be given to a tailor to make, or to a laundress to wash, or the like; if the goods be taken out of the possession of the bailee, either bailor or bailee may bring an action of replevin, Co. Lit. 145 b., trespass, 2 Rol. 551, l. 25, 31, 569; l. 17, 22, 25. 20 H. 7, l. a., or trover, R. 1. Rol. 4. l. 52. So if any injury be done to the goods whilst in possession of the bailee, either bailee or bailor may maintain trespass or case, according to circumstances. See 1 Barn. & Ald. 59.

Tenant and Reversioner.] If a rivulet which runs between two *closes, be stopped by the occupier of one of them, by which means the other is flooded and the timber trees rotted, &c.; if the close so injured be in the occupation of a tenant for a term of years, the termor and the reversioner may each maintain an action against the wrong-doer; the termor, for the loss of the shade and shelter of the trees, &c.; the reversioner, for the damage done to the inheritance. 3 Lev. 209. See 2 Ro. Abr. 55. 4 Burr. 2141. acc. So in all cases where a trespass is of such a permanent nature as to be injurious not only to the tenant in possession, but also to the inheritance generally; the termor may have his remedy by an action of trespass, and the reversioner by action on the case. Ante, p. 9, 10, 16. But in all other cases for an injury to land, not amounting to an ouster, the action must be brought by the tenant in actual possession.

Assignee.] If a reversioner assign his reversion, the assignee may have an action of debt for rent, 5 H. 7, 18 b, 19 a. Bro. Dette. 141. 1 Ro. Abr. 591. 3 Co. 22 b. 4 Mod. 81. 3 Mod. 338, or covenant for a breach of any covenant running with the land, 1 Saund. 237. See Bro. Sum & Sev. 6., against the lessee; or if the lessee have assigned his term, the assignee of the reversion may in like manner have debt or covenant against the assignee of the term; 3 Mod. 337, 338. 1 Show. 199. Carth. 182. 1 Salk. 80, 81; and if the assignment have been to two, the action must be by both. 1 B. & P. 67. 1 Sid. 157. 1 Lev. 109. L. Raym. 80. So the assignee of the term may have an action of covenant against the lessor or his assignee, for breach of any covenant running with the land. Cro. El. 373. 436. Moor, 419. 5 Co. 17, a. And the same of a devisee, to whom a reversion or term is devised. See 4 M. & S. 53.

After an assignment or sale of goods and chattels, that is, after the

sale is completed by delivery, all actions relating to them must be brought by the assignee or vendee. Thus, where the vendor sends the goods purchased to the vendee by a carrier, an action against the carrier for the loss of the goods must be brought by the vendee and not by the vendor, whether the carrier were named by the vendee, 8 T. R. 330, or not. 3 B. & P. 582. See Cowp. 294. 5 Bur. 2680. 1 Bulst. 68. Hardr. 321. 1 T. R. 659. So trover or other action for goods shipped on board of a ship, must be brought by the consignee; see 1 Marsh. 323; unless such consignee be merely an agent. 4 East, 211. 3 B. & A. 277. But the rule in these cases may be controlled by an agreement between the parties: as if the vendor agree to deliver the goods carriage free, or upon being paid so much for the carriage of them; as the property in the goods cannot in that case vest in the vendee, until they are actually placed in his custody and possession, he cannot maintain any action for a cause of action relating to them accruing before that time.

As to choses in action: by the strict rule of law they cannot be assigned; and consequently no person can maintain an action in his own name as assignee of them. There are a few exceptions, however, to this rule: the assignee of a bail-bond may sue upon it in his own name, by stat. 4 Ann. c. 16, s. 20; see 1 Arch. Pr. C. B. 68; the assignee of a replevin bond may sue upon it in his own name, by stat. 11 G. 2, c. 19, s. 23; see 2 Arch. Pr. C. B. 64; and the indorsee of a bill of exchange, or promissory note, may sue upon it in his own name, by the law merchant. So, the assignees of a bankrupt may sue for a chose in action of the bankrupt, in their own name, by stat. 6 G. 4, c. 16, s. 63; but if an action were already commenced by the bankrupt before his bankruptcy, the assignees must proceed to judgment in his name, and then make themselves parties to the record by *scire facias*. 2 Arch. Pr. C. B. 139.

Executors, &c.] Executors or administrators may sue in their own name, as executors, &c. for all causes of action for which their testator or intestate might have maintained an action, except for injuries to the person. See 2 Arch. Pr. C. B. [26] 307, and see post B. 4. And for all injuries to the real estate of the deceased, committed in his life-time and within six months of his decease, and for which he might have maintained an action, his executors or administrators may have an action, of trespass or trespass on the case, as the case may be, within one year after his decease; and the damages recovered shall be assets. 3 & 4 W. 4, c. 42, s. 2. If a debtor make his creditor and another his executors, and the creditor never intermeddle, but refuse to act, such creditor may bring an action against the other executor for the amount of his debt. W. Jon. 345. 3 T. R. 557. As to feme executrix, see ante,

p. 39, "Barron and Feme;" and as to the joinder of executors, see post.

Care must be taken that the plaintiff or plaintiffs be correctly named in the declaration; for although misnomer is not now pleadable in abatement, 3 & 4 W. 4, c. 42, s. 11, yet the defendant may oblige the plaintiff to amend his declaration in this respect, and to pay the costs of the amendment. *Id.* see Arch. Pr. C. B. 119, 120. Care must also be taken to state the name correctly in the writ; for if there be a variance between the writ and declaration in this respect, the court upon application would set aside the proceedings for irregularity.

SECT. 2.

Joinder of Plaintiffs.

Parceners.] As parceners are considered in law as making but one heir they must consequently sue jointly in all actions brought by them for the recovery of their inheritance, before partition. Co. L. 164 a. Therefore if parceners be disseised, they must join in the action. Co. L. 164 a. Bro. Several Prec. 1. So, if a man be disseised and die, and his title descend to parceners, they must join in the action. Co. Lit. 164 a. But if parceners be disseised and die, their heirs must sue severally, and not jointly because the right descending is in this case several, although after recovery they be parceners again. Bro. Several Prec. 1. Joinder in Action, 43. In replevin, the defendant cannot make consuance as bailiff to one coparcener, for a moiety of the rent. 5 Mod. 141. 1 L. Raym. 64. Skin 596. Carth. 364. So one parcener cannot avow for her moiety of the rent, but must avow in her own right, and as bailiff to the other, for the entire rent. 1 Salk. 390. Carth. 364. so in trespass or case for any damage done to their land, parceners must join.

But after parceners have made partition, they cannot recover in a joint action, or on a joint demise in ejectment; 1 Bac. Abr. Coparceners B.; because their seisin is no longer joint, but several. So, if parceners in tail alien and die, the issue must have several actions; because the alienation was a partition in law. Bro. Coparcener, 2.

Joint-tenants.] Joint-tenants must join in all real and mixed actions, for they have but one joint title and one freehold. Co. Lit. 189 a, 195 b. And therefore they ought to join in a writ of right, *Præcipe quod reddat*, assize, waste, *quare impedit*, &c.; Th. D. l. 2, c. 2; [and in ejectment, the declaration must be upon their own demise. All real actions, how-
[*48]

ever, with the exception of the writ of dower *unde nihil habet*, and the right of dower, are now abolished, as are also all mixed actions, except *quare impedit* and ejectment.] So they ought to join in trespass and other personal actions, where they have a joint interest. So, in debt or avowry for rent, R. 5 Mod. 73, [or avowry for damage feasant. 5 Mod. 151.] But they are not to join in an *audita querela*, where execution is sued against them on a joint recognizance; for it is a several grievance. R. Noy, 1. Com. Dig. Abatement, E. 9.

Where two joint tenants of a house let it to a tenant, and after receiving the rent for some time through an agent appointed by both, one of them gave the tenant notice to pay his moiety to a different agent, and he did so: held, that this receiving of the rent by each separately, did not prevent them afterwards from joining in an action for use and occupation against the tenant, to recover rent subsequently accrued. *Powis et al. v. Smith*, 1 D. & R. 490.

Tenants in Common.] Tenants in common shall not join in a real action, for they have several titles; Lit. s. 311; nor in a writ of entry upon stat. 5 R. 2, or upon stat. 8 H. 6; Th. D. l. 2, c. 3, s. 8; nor in a writ of waste, upon a lease for life; see 2 Mod. 61; nor for forging of false deeds, for that concerns the inheritance. 2 Cro. 231. So, if they make a joint lease in tail or for life rendering rent, which is not entire, but may be divided, they shall make several avowries for the rent, for that is incident to the reversion which they claim by several titles. Lit. s. 314. [5 T. R. 249.] So, they shall not join in an avowry for rent not entire, reserved upon a lease for years; Lit. s. 317; or if a distress for a rent not entire be rescued, they shall not join in *rescous*. Lit. s. 314. But in a real or mixed action for a thing entire and incapable of division, tenants in common must join: as in assise for the service of a horse; Co. L. 197; or in *quare impedit*, the presentation being entire; Co. L. 197 b. Th. D. l. 2, c. 3, s. 3; or in waste, upon a lease for years; 2 Mod. 62; or in a writ of ravishment or right of ward. Co. L. 197, b. Th. D. l. 2, c. 3, s. 5. So, in all personal actions for a matter that concerns the tenements in common, [and where the injury complained of is entire and indivisible,] tenants in common must join: as in trespass *quare clausum fregit*. D. 1 Sid. 49. Th. D. l. 2, c. 3, s. 4. Co. L. 198, a. 1 Salk. 4. R. 5. H. 4, 1 b; or in an action on the case for a nuisance, &c. 2 Cro. 231; or in detinue of charters; Co. Lit. 197, b. Th. D. l. 2, c. 3, s. 6; or in *warrantia chartæ*; Co. L. 197, b; or in an action on the case for ploughing their lands, whereby their cattle are hurt; R. Jon. 142. Com. Dig. Abatement. E. 10; or the like. Tenants in common, however, may join or sever *in debt or covenant for rent: Carth. 289: they may join, because the contract is entire; or

they may sever, because the rent is distributable. So, one tenant in common may sue for the double value of his moiety of the rent, under stat. 4 G. 2, c. 28; 2 W. Bl. 1077; or both may join in an action for the double value of the whole rent. But in all other cases, where that which is sued for is not distributable, as in covenant for not repairing, where the damages are not distributable because uncertain, tenants in common must join in the action. 1 Sid. 157. 1 Lev. 109. T. Raym. 80. And see Bro. Joinder in action, 104. 28 Ed. 3, 90. 18 H. 6, 6, 7. Keilw. 14. Moor, 40. Bendl. 89. Godb. 90, 283.

It has been decided that tenants in common cannot recover in ejectment on a joint demise; 1 Show. 342. 2 Vent. 214. Comb. 190. Carth. 224. Co. Lit. 200. 2 Wils. 232; not, it should seem, for the reason usually assigned for it, namely, that tenants in common cannot join in a lease; for they may join or sever in making leases, at their option; Co. Lit. 168. 1 Ro. Abr. 848, 877. 3 Bac. Abr. Joint-tenants, H. 1; but because of the inconvenience of trying two titles in the one action, as tenants in common claim by distinct titles. See post, in "Ejectment."

Joint-contractor, &c.] In actions *ex contractu*, all the persons with whom the contract was made, if living, must join in the action; or if any of them be dead, that fact must be stated in the declaration, and the action may be brought by the survivors alone, if the cause of action survive to them. Thus, if two deliver 100*l.* to A., one alone cannot maintain an action of account for it. 10 Ed. 3, 489. See 10 Ed. 4, 5. Th. D. l. 11, c. 47, s. 2.

So if a covenant be made to two or more jointly, all the covenantees must join in an action on it, 5 Co. 18 b. Hob. 172. 2 Leon. 27. And see Comb. 115, even although the covenant be to do a thing for the benefit of one of them only. Yelv. 177, but see 3 Mod. 263. And the same in the case of a bond, all the obligees, if living, must join in an action upon it; or if any of them be dead, that fact must be averred in the declaration, and the action be brought by the survivors. 1 Sid. 238. 420. 1 Vent. 34. 36 H. 6, 16. Lil. Ent. 165. Lib. Plac. 115, pl. 15. 1 Brown Ent. 163, pl. 25. But if a man covenant with two or more, *et cum quolibet eorum*, and the interest of the covenantees be several and not joint; as if a man devise Blackacre to A., Whiteacre to B., and Greenacre to C., and covenant with them *et quolibet eorum*, that he is lawful owner of the said acres, each of the covenantees may alone maintain an action on the covenant. 5 Co. 18 b, 19 a. 3 Leon. 160, 161. 2 Leon. 47. Or even if a man covenant with two or more jointly, without the words "*et quolibet eorum*," yet if the interest and cause of action of the covenantees be several and not joint, each of them may bring an action for his particular damage, notwithstanding

the words of the covenant are joint. 5 Co. 9 a. Dy. 327 b: 2 Mod. 82. 3 Mod. 263. Bul. N. P. 157. 1 Saund. 154, (n. 1.) And on the contrary, although a covenant with several contain the words "*et quolibet eorum*," or other words to the like effect, yet if the interest of the covenantees be joint and not several, as if in the above case the *three acres had been demised to A., B. and C., jointly, the words "*et quolibet eorum*" must be rejected as surplusage, and the covenantees must sue jointly upon the covenant. 5 Co. 18 b, 19 a. 3 Leon. 160, 161. 2 Leon. 47. 1 Saund. 155, (n. 2.)

In assumpsit, all the parties with whom the contract was expressly or impliedly made, must join in the action, if the consideration be joint and the thing contracted to be done, be for the benefit of all. Thus, where the separate cattle of A. and B. were distrained, and C., in consideration of 10*l.* paid to him by them jointly, promised to have their cattle redelivered to them, the court held that A. and B. should join in the action, because the contract and consideration were joint, it not being known how much of the 10*l.* one gave, and how much the other. 1 Ro. Abr. 31, pl. 9. Styl. 156, 157. 203. And where three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his name only, and such one made a contract for the purchase accordingly: it was holden that all might join in suing the vendor for a breach of that contract. 10 B. & C. 671. And see 2 Tyr. 140. Where a father and son agreed with a purchaser to sell an estate, and it was agreed that part of the purchase money should be paid to the son; the father and son having joined in an action for this part of the purchase-money, the court upon demurrer gave judgment for the defendant, holding that as this was a duty vested in the son, he alone should have brought the action, 3 Mod. 263. After a dissolution of partnership between A., B., & C., C. drew bills in the name of all the partners in favour of a stranger, who afterwards recovered upon them against A. and B.; and the judgment was satisfied by the attorney of A. and B., who advanced a part of the money himself, and borrowed the remainder upon the joint credit of A. and B.: the court held the money so paid in satisfaction of the judgment, might be recovered in a joint action by A. and B. against C.; for here the consideration was joint, and the implied contract consequently joint also. 5 East, 225. But where A., B., and C. were appointed assignees under a commission of bankrupt, and A. and B. paid each half of the solicitor's bill: it was holden that A. and B. could not join in an action against C., for his proportion of the money so paid, because the consideration was several and not joint; each should have brought a separate action. 3 B. & P. 235. So, where A. and B., together with C. and D., were owners of

the ship, and E. owner of another, and a prize being taken by both ships and condemned, was shared between them; but afterwards the sentence of condemnation being reversed, and restitution awarded with costs, the costs were paid by A. and B., C. and D. having in the meantime become bankrupts: the court held that an action could not be brought by A. and B. against E., for his proportion of the money so paid; because it was either a partnership transaction, when C. D. should have joined or not, when separate actions should have been brought by A. and B. 2 T. R. 282.

In detinue upon a bailment, all those who bailed the thing detained, must join in an action: as if there be a bailment of a writing by two, one alone cannot bring detinue for it. 22 Ed. 3, 5. 24 Ed. 3, 24. Th. D. l. 2, c. 3, s. 6. But, on the other hand, if a charter be made to two or more, and one of them bail it to a stranger, he *who bailed it shall alone have the action. Th. D. l. 11, c. 47, s. 8. R. Latch. 124. If, however, there have been no bailment, but the action be brought upon a supposed finding, all persons jointly interested in the thing detained should join in the action.

In actions, which though *ex delicto* in form, are *ex contractu* in substance, the same persons should be made parties as if the form of the action were *ex contractu*. Thus, in case against a carrier or bailee, the same persons should join as plaintiffs, as if assumpsit were brought instead of case. See 6 T. R. 369. 2 New Rep. 365.

Lastly, as to actions *ex delicto*; where two or more persons have received a joint damage from the tort of another, and are also jointly interested in the thing which was the subject of the injury, they should all join in the action. Thus, if there be several part-owners of a ship or goods, they ought to join in an action against a person who takes them away or prejudices them. R. 3 Lev. 351. 1 Salk. 32. 4 Mod. 176, 181. Skin. 334, 361. So, if two persons be robbed on the highway of a sum of money, in which they are jointly interested, they may join in an action against the hundred; but if the money were the several property of the parties, each must bring a separate action. Dy. 370 a. pl. 59; and see 2 Leon. 12 pl. 19. So, where two persons obtained a *mandamus*, it was holden that they might join in an action for a false return to it; because the prosecution and charge of the *mandamus* were joint. 3 Lev. 362, 363. So, if several persons have a joint interest in the things distrained, they must join in the replevin. Co. Lit. 145, b.

So, if two or more persons have received an entire joint damage, they may in general join in the action, although their interests be several. Thus, if there be two ancient mills in a manor, at one or other of which the tenants are bound to grind their corn; and if one of the ten-

ants do not grind his corn at either of them, the owners of both the mills may join in an action against him. 2 Saund. 115. 2 Lev. 27. 1 Vent. 167. So, it has been holden that several persons, called dippers, at Turnbridge Wells, might join in an action against a person who exercised the business of a dipper without being duly appointed, and disturbed the plaintiffs in the exercise of their employment. 2 Wils. 414. And where bail called together upon an attorney, and employed him to render their principal, it was holden that one of them alone could not afterwards maintain an action against the attorney for neglecting to effect the surrender. 1 Taunt 7. So, if a man hold several lands of several lords by heriot custom, and, to defraud them of their heriot, make a fraudulent gift of all his heriotable beasts, all the lords may join in one action upon stat. 13 El. c. 5 Dy. 351. But if the parties be interested in different degrees, they cannot join in the action, although for the same tortious act: as for a nuisance or other act, which may damage the inheritance, the tenant and the reversioner cannot join in the same action. So, for a trespass in cutting down trees, the tenant and reversioner, or the copyholder and lord, cannot join in the same action. 2 H. 4, 12. So, if a stranger put his cattle upon a common, the commoner and lord cannot join in an action against him. So, if goods be taken out of the possession of a bailee, the bailor and bailee cannot join in an action of trespass, &c. for them. 48 Ed. 3, 20, 21.

*If however neither the damage nor the interest be joint, the parties injured cannot join in an action for the same tortious act. As where the several goods of different persons are distrained, at the same time and by the same person, yet they cannot join in an action of replevin. Bro. Replevin, pl. 12. So, two persons cannot join in an action for assault and battery, or false imprisonment; for the imprisonment or battery of the one cannot be the imprisonment or battery of the other. Bro. Joinder in Action, 68. Fitz. Id. 17. Owen, 106. Keilw. 55. So if a man say of two others that they are thieves or murderers, or the like, the persons so slandered cannot join in an action against him, but must sue separately. Cro. Car. 513. Dy. 19 Gouldsb. 76. But it should seem that joint-tenants or coparceners may join in an action of slander of their title, if they have thereby received a joint damage. 2 Saund. 117 a. So it has been decided that partners may maintain a joint action for defamatory words spoken of them in relation to their trade. 3 B. & P. 150.

Partners.] Partners are joint tenants; with this exception only, that by the law merchant there is no right of survivorship between them. Consequently they must join in all actions respecting the partnership property, even although one of them be an infant. 14 East,

210. And where three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and such one made a contract for the purchase accordingly: it was holden that all might join in suing the vendor for a breach of that contract. 10 B. & C. 671. But if one partner die, although there be no *jus accrescendi*, and the surviving partner and the executor or administrator of the deceased be tenants in common of the partnership property; yet the right of action survives, and the action must be brought by the surviving partner alone, who upon recovery will become accountable to the executor for his moiety. 2 Salk. 444. 1 L. Raym. 340. R. contra, 2 Lev. 188. 228. adm. 2 Lutw. 1493. dub. 1 Show. 189. And where money was due to two partners, and after the death of one of them it was paid to a third person, the Court held that the surviving partner might maintain an action in his own right, and not as survivor, for money had and received to his use. 2 T. R. 476. If one partner however become a bankrupt, his assignees and the solvent partner shall afterwards join in all actions which may be brought by the assignees, for causes relative to the partnership property; 10 East, 418; and if, instead of doing so, the action be brought by both partners, the defendant may plead in bar the bankruptcy of one of them. 8 T. R. 140. But it seems a dormant partner need not be joined as plaintiff in an action; nor can any advantage be taken of the nonjoinder in such a case. 2 Taunt. 324, 325 n. And on the other hand, if a firm include the name of a person, who in fact is not a partner, yet it has been holden by Lord Ellenborough at *nisi prius* that such person should be made a party to the action; 2 Campb. 302; at least, to excuse the omission, very distinct and satisfactory proof must be given that such person has no property whatever in the partnership fund, or share in the business as a partner. *14 East, 210; see 2 Brod. & B. 11. 10 B. & C. 20. The persons to be named plaintiffs, should be such as were partners at the time the contract was made, 1 Esp. 180, or the tort committed, and not merely such as were partners at the time of the action brought.

Executors.] In actions by executors, all must join, Ast. Ent. 11, [Bro. Executors, 88]; though some be within the age of 17 years, R. Yelv. 130. 2 Saund. 213. T. Raym. 198. [Went. 95.] See 1 Brownl. 101. 1 Lev. 181, or do not administer or prove the will, R. 1 Lev. 161. 1 Salk. 3, or refuse before the ordinary. Th. D. l. 2, c. 11, s. 6, [9 Co. 37] Com. Dig. Abatement, E. 13. So, if there be two administrators, both must join in the action. Rast. Ent. 324, c. Reg. 140 a. Com. Dig. Abatement, E. 14.

Assignees of Bankrupt.] In actions by the assignees of a bankrupt,

all the assignees must join. 2 Stark. 424. So the assignees of A., and the assignees of B., under separate commissions, must join in an action for a joint debt due to A. and B.: 3 T. R. 779; but they cannot sue jointly for such a debt, and also for debts due separately to A. and B., in the one action. 3 T. R. 433. So if one partner of a firm become bankrupt, his solvent partner must join with his assignees in action relating to the partnership property; ante, p. 52; and this may be done even in an action against a creditor of the firm, for the amount of a bill of exchange indorsed to him by the bankrupt partner, after the act of bankruptcy. 10 East, 418.

Summons and Severance.] Where several persons have a joint right of action, any one or more of them may commence the action in the names of all, without the consent or privity of the others; Co. Lit. 139. Bro. Sum. & Sev. 17; and in real actions, Co. Lit. 139. Keilw. 47. Bro. Sum. & Sev. 4, 16, 18. Judgm. 144, mixed actions, Co. Lit. 139. Bro. Chart de Terre, 74. Sum. & Sev. 9. 2 Ro. Abr. 488. Keilw. 47, in detinue of charters (for it standeth in the realty), Co. Lit. 286. Bro. Charte de Terre, 74, and in all personal actions by executors for causes of action accruing in the life-time of the testator, Went. Ex. 96, 104. Carth. 61, 191. Hardr. 317. 2 Ro. Abr. 488. 9 Co. 37. 1 Salk. 3, 9. Godolph. 134, if one or more of the persons so named as plaintiffs do not appear, or make default after appearance, the other may have judgment of severance, or, as it is technically termed, judgment *ad sequendum solum*. This judgment may be prayed only where all the persons named as plaintiffs must of necessity have been joined in the action, 6 Co. 25, 2 Ro. Abr. 488. Bro. Quare Imp. 2, such as parceners, Co. Lit. 164; and see Bro. Coparcener, 2, joint-tenants, Bro. Sum. & Sev. 17. 5 Mod. 150, 151. See Noy, 1, or executors; Carth. 61. 1 Salk. 3, 9. 9 Co. 37; but not by tenants in common, unless in *Quare Impedit*. 2 Inst. 197. 5 Mod. 11.

If the default be before appearance, it is necessary to sue out a writ of summons *ad sequendum semel*, (see the form, Thes. Brev. 301,) and let the sheriff serve a copy of it upon the party who has made default; Co. Lit. 139. Bro. Sum. & Sev. 10. 2 Ro. Abr. 488; and if upon the appearance day of the writ, he do not appear and join *in prosecuting the action, judgment of severance will be given by the court in which the record is. Bro. Sum. & Sev. 10. 2 Ro. Abr. 489. But if default be made after appearance, a writ of summons is unnecessary, and the court will give judgment of severance without it. Bro. Sum. & Sev. 10. 10 Co. 135. Hardr. 317.

After judgment of severance given, the other plaintiff then proceeds as to his moiety, and in some cases for the whole: thus in real actions,

he proceeds for a moiety only : but in *quare impedit*, Co. Lit. 197 b. Dy. 279. 10 Co. 134, he proceeds for the whole. And where he proceeds for the whole, the subsequent death of the plaintiff severed has no effect upon the suit ; Co. Lit. 197 ; but where he proceeds for his moiety only, such death will abate the suit. Co. Lit. 188. Cro. Car. 574. Cro. Jac. 19. 10 Co. 134. After severance, the party severed can never be mentioned in the suit, Bro. Proc. 12. 2 Ro. Abr. 489, 98. Cro. Car. 420, nor derive any advantage therefrom. Dal. 51, pl. 17. 53, pl. 30. Went. Ex. 104, 105. But see Bro. Coparcener, 2.

In personal actions (with the exception of those by executors, and of detinue of charters, as above-mentioned,) there can be no summons and severance : Co. Lit. 139. Bro. Chart. de Terre, 74. Sum. & Sev. 8 Carth. 191 ; and in these cases, although one of several, jointly interested, may bring the action in the name of all, without their consent or privity, yet any of the others may release the action, and render his proceedings fruitless ; see 7 Taunt. 421 ; and his only remedy in that case will be by action on the case against the relessor, for damages for the injury he has sustained by his releasing. Or any of the others thus joined in the action without their consent, may apply to the court to stay proceedings, until they shall be indemnified by the person actually bringing the action, as to costs of a nonsuit or verdict against them. If an executor however release an action, the other executor cannot maintain an action against him for doing so ; but it will amount to a *devastavit* in the relessor, for which he is answerable in another manner. Godolph. 134. Dal 51, pl. 17, 53, pl. 30. Went. Ex. 104. It may be necessary to mention, that a release by a joint demandant or plaintiff in a real or mixed action, affects merely his moiety, and is not a bar to the whole cause of action as in personal actions. Bac. Abr. Release D.

Non-joinder.] In debt on bond, if all the obligees do not join in the action, and the death of those omitted be not averred in the declaration, the defendant may either plead the non-joinder in abatement ; 1 Sid. 238. 420. 1 Vent. 34 ; or, (which is much the better mode,) he may set out the bond on oyer, and demur generally ; 1 Sid. 238. 420. 1 Vent. 34. 1 Saund. 291, f. Com. Dig. abatement, E. 12 ; or he may take advantage of it at the trial as a variance, upon the plea of *non est factum* ; 1 Saund. 154, (n. 1.) ; or if it appear upon the face of the declaration that there is an obligee living, who is not named, the defendant may demur generally, without praying oyer, or he may make the non-joinder the subject of a motion in arrest of judgment. Al. 41. 2 Str. 1146. Bul. N. P. 158. 1 Saund. 291 f. And the same in the action of covenant *when all the covenantees do not join in the action. 1 Saund. 291 f, 154, (n. 1.) 1 B. & P. 67.

In actions upon contracts not under seal, brought by some only of several who ought to join, without averring the death of the others in the declaration, the defendant may plead the non-joinder in abatement, or take advantage of it at the trial upon the general issue, 2 Stark. 424, at his option; or if it appear upon the face of the declaration that the contract was made with others as well as the plaintiff, it will be error, 5 Co. 18 b. 1 Saund. 153, 154, (n. 1.) 2 Str. 820. 1146. 1 Vent. 34. Skin. 401. Bul. N. P. 158; and the defendant may either demur, or make the non-joinder the subject of a motion in arrest of judgment or of a writ of error.

In actions for a tort, such as trespass, case, &c., if brought by some only of several who ought to join, the defendant must plead the non-joinder in abatement, there being no other way of taking advantage of it, even although it appear upon the face of the declaration; 2 Vin. Abr. 59. pl. 21, 25, 26, 27. Cro. El. 554. Latch. 152, 153. 1 Mod. 102. 1 Show. 29, 103. 2 Lev. 113. Skin. 640. 1 Salk. 32. 290. Brown. Ent. 8 pl. 36. Clift, 7, pl. 23. Lib. Plac. 2, pl. 11. 2 Str. 820. 6 T. R. 766. 1 Saund. 291, f, g; and if he fail to plead it in abatement, the party omitted may afterwards sue alone, and the defendant cannot plead in abatement to such action. 7 T. R. 279.

In actions by executors, whether *ex contractu* or *ex delicto*, if all the executors named in the will do not join, the defendant should crave oyer of the probate, and then plead the nonjoinder in abatement; he cannot take advantage of it in any other way. 1 Saund. 291 g.

Misjoinder.] If persons join as plaintiffs in an action, who should not, the defendant may plead the misjoinder in abatement, whether the action be real, 12 H. 4, 15, personal, R. Cro. El. 143. Dub. 2 Ed. 4, 23. R. 1 Leon. 315, or mixed; 11 H. 4, 54; or it will be a good cause of nonsuit at the trial; 3 B. & P. 235; or if the objection appear upon the face of the declaration, the defendant may demur generally, 2 Saund. 115. 3 Lev. 363. 3 Mod. 263, or move in arrest of judgment, 1 Ro. Abr. 31, pl. 9. Sty. 156, 157, 208. 3 Lev. 362, or bring a writ of error.

SECT. II.—DEFENDANTS.

1. *Against whom the action is to be brought.*

Real actions are brought against the immediate tenant of the freehold, whether he be in the actual possession of the premises or not: thus, supposing there are tenant for years in possession, remainder to another person for life, remainder to another in tail, remainder to another

er in fee, the action must be brought against the tenant for life, because he is the first or immediate tenant of the freehold.

In *quare impedit*, when the bishop refuse to admit and institute a clerk upon pretence of incapacity or the like, the writ is brought against the bishop only; but where the refusal or delay arises from an adverse presentation, although the writ in such a case may be brought against the patron alone, or the patron and his clerk jointly, yet it is better to bring it against the bishop, patron and clerk jointly, for reasons which shall be hereafter stated. In ejectment, a copy of the declaration should be served upon each of the tenants on the premises sought to be recovered, provided the several tenements be in the same county: for if you bring separate actions for each farm or tenement, the Court upon motion would consolidate the actions. See 2 Arch. Pr. C. B. 197.

In personal actions *ex contractu*, the action is brought against the person, who, either expressly or by implication of law, made the contract. In personal actions *ex delicto*, the action is brought either against the person who actually committed the injury, or who aided and assisted in committing it; or against the person who is otherwise legally liable for it.

There are some cases also in which a plaintiff may maintain separate actions against several persons, for the same cause of action; as in the case of a trespass, for instance although the several persons were jointly concerned in it. 14 H. 4, 21. 11 H. 7, 6. And the same, generally, in other actions *ex delicto*. See the next division of this section. In actions upon bills of exchange, the drawer may sue the acceptor; the payee may bring separate actions against the drawer and acceptor: and an indorsee may have separate actions against each of the indorsers, the drawer and the acceptor. So, in the case of a promissory note, the payee may sue the maker, and an indorsee may have separate actions against the several indorsers and the maker. If A. take the goods of C., and B. take them from A., C. may have his action against either A. or B., at his election. 1 Sid. 438. So if A. bail goods to B., and B. bail them to C., and C. waste them: A. may have his action against C. or B. at his election. 1 Ro. Abr. 90. So, if a man send his horse to a smith to shoe, and that smith send him to another, who pricks him: the owner may maintain an action against either, at his election. 1 Ro. Abr. 90. So, if a man falsely affirm to the steward of a manor that a sheep belonging to me is an estray, whereupon the steward seizes it, I may have an action against the person who gave such false information, although I may have also good cause

of action against the steward. *Alleyne* 3. 1 Ro. Abr. 101. So, if a man slander my title, whereby I am wrongfully disturbed in my possession: though I have a remedy against the trespasser, yet I may also have an action against him who caused the disturbance. *Alleyne*, 3. Per Hale.

The other necessary observations upon this subject will be found under the other heads.

Joint tenants, &c.] As to the cases in which one joint-tenant, tenant in common, parcener, partner or joint-contractor, may be sued by the other, see ante, p. 36, 37. As to the joinder of joint-tenants, tenants in common, parceners, partners, joint-contractors, &c. see post.

**Baron and Feme.*] It is clear that a husband cannot maintain an action against his wife, or a wife against her husband, as already mentioned, ante, p. 37.

Real actions must be brought against husband and wife, when the husband is seised in right of his wife; Th. D. l. 5, c. 4, s. 1; or when he is seised jointly with his wife by purchase before or after marriage; Th. D. l. 5, c. 4, s. 1; or where he holds in coparcenary with his wife, without partition made before marriage; Th. D. l. 5, c. 4, s. 1; or where the land descended to them in parcenary after marriage. Th. D. l. 5, c. 4, s. 1. So, if the husband enter, claiming in right of his wife, though the wife have no right, the action must be brought against both. 35 Ass. pl. 5. Com. Dig. Abatement, F. 7.

Actions for debts due by the wife before coverture, must be against husband and wife. 7 T. R. 348. So, upon all other contracts by the wife before coverture, the action after coverture must be against husband and wife: Thus in debt for rent, upon a lease at will to the wife *dum sola*, Co. Lit. 351 b, or upon a lease for years, where the rent accrued due before coverture, Mod. Int. 162. 175, husband and wife must be jointly sued. So, in all other cases where the husband is charged with an act of his wife done before coverture, the action shall be against both: as in trover, upon a conversion by the wife before marriage; Co. L. 531 b; or in detinue, for goods taken by the wife before coverture. Id. Com. Dig. Baron and Feme, Y. Yet it has been holden that a recovery in an ejectment against a wife, cannot be given in evidence in an action of trespass for mesne profits against husband and wife; for the husband was no party to the ejectment. 7 T. R. 112.

Secondly, as to personal actions, where the cause of action accrued after coverture: it is clear that in an action upon any contract of the husband, or for any tortious act done by him, the wife cannot be made a party. So, upon the wife's contracts during coverture, the action should be against the husband alone: thus, an action against husband

and wife upon an assumpsit by both, would be bad; for *quoad* the wife, the promise was void; Palm 313; even although it were for clothes bought by the wife. R. 4 Leon. 42. So, debt lies against the husband alone, for rent incurred during coverture, upon a lease to the wife *dum sola*. Tho. Ent. 117. But debt for rent, upon a lease for life or years made to husband and wife, must [it seems] be against both. 1 Rol. 348, l. 45, 50. For torts by the wife, however, the action must be brought against husband and wife: thus, trover, for a conversion by the wife alone, must be brought against both. 1 Rol. 6, l. 10. R. 1 Leon. 312. But, where the tortious act is jointly done by husband and wife, as trover of goods, and conversion by both, the action may be against the husband alone, for the whole may be intended the act of the husband, R. 1. Rol. 348, l. 37. R. Palm. 343. Com. Dig. Baron and Feme, Y. Cro. Car. 254. 494. Co. Lit. 351 b., or it may be brought against husband and wife. Yelv. 165, 166. 2 Saund. 47, i. 2 Str. 1094. Andr. 242.

For a cause of action against a feme covert, as executrix or administratrix, the action must be brought against husband and wife. But in cases where an executor may be charged in his own right, the action may be brought against the husband alone: thus, debt may *be brought against husband alone, for rent, upon a lease which the wife has as executrix or administratrix; Tho. Ent. 117; for an executor in such a case might be charged as assignee of the term.

But a wife may be sued alone without her husband, if the husband be in exile, Co. Lit. 132 b. Th. D. l. 4, c. 4 s. 1. [1 T. R. 8,] or have abjured the realm, [or be transported, 1 T. R. 8, 9,] see Co. Lit. 133 a. Th. D. l. 4, c. 4, s. 2, or be an alien enemy and out of the realm, R. Salk, 116, [see 1 B. & P. 357,] or if they have been divorced. Cro. El. 352. But it is not sufficient to entitle a plaintiff to sue a married woman alone, that her husband lives out of the realm, Per. Lit. 18 Ed. 4, 4. Com. Dig. Abatement, F. 2. 2 B. & P. 226, or lives in Ireland, 1 New Rep. 80, or that she lives apart from her husband under articles of separation, though she have a separate maintenance. 8 T. R. 545. See 7 East, 582. 5 T. R. 679. 4 T. R. 766. See 1 T. R. 5, cont.

If an action be brought against a feme sole, and she marry pending the writ, the action is not abated by the marriage; Adm. 2 Rol. 53. R. 2 Str. 811. 2 L. Raym. 1525. Barnes, 355; but the plaintiff may proceed to judgment against her as a feme sole, and then revive it against husband and wife by *scire facias* before he sues out execution see 2 Arch. Pr. C. B. 84; or he may sue out a *ca. sa.* against her, without making the husband a party by *scire facias*, if he wish it. 4 East, 521.

Nonjoinder or misjoinder of baron and feme as defendants may be ta-

ken advantage of in the same manner as nonjoinder or misjoinder in other cases. See post. Where a feme covert however is sued alone, her husband and she may afterwards bring error *coram nobis*, and assign the coverture as error. See 1 Arch. Pr. C. B. 239. Also, when a husband is sued alone, for a debt of his wife due before coverture, if it appear upon the face of the declaration, he may demur, move in arrest of judgment, or have a writ of error; see 2 New Rep. 405; or if it do not appear upon the face of the declaration, the plaintiff may be nonsuited.

Master and Servant.] As to the cases in which a master may be sued by his servant, or a servant by his Master, see ante, p. 42.

As to actions against them by strangers: if a servant make a contract for his master, under a general authority from him to do so, as when he purchases articles for his master's trade, being in the habit of doing so, the action must be against the master and not against the servant. But a servant cannot bind his master by drawing a promissory note or accepting a bill of exchange, in his name, unless the master have given him an express authority to that effect, or assent to it afterwards; Comb. 450. 1 L. Raym. 224. 3 Salk. 234. Yelv. 137. And see 2 Str. 955. 2 Barnard. 320; nor can he bind his master by taking a bill in payment, where his master has ordered him to receive money, unless the master acquiesce in the payment. 2 Salk. 442. 5 Mod. 398. 6 Mod. 36. 2 L. Raym. 928. Com. Rep. 138. And see 10 Mod. 109, 110. 11 Mod. 72. If a man send his servant with money to buy meat or other goods, and the servant buy upon credit, the master is not chargeable; Per Holt, 1 Show. 95. 4 Esp. 174. Peake, 47; but if in such a case the master had *previously been in the habit of purchasing of the tradesmen upon credit, he would be liable, even although the goods purchased never came to his use, 1 Show. 95. 2 Vern. 643. Comb. 450. 1 L. Raym. 224. 3 Salk. 234. Doct. & St. Dial. 2, c. 42. 1 Str. 505, unless indeed he had given notice to the tradesman not to trust the servant. Brownl. 64. See Bac. Abr. Mast. & Serv. K. 3 Esp. 85. For contracts made by the servant in his own name, however, the master is clearly not liable; nor is he liable upon an implied assumpsit to pay even for medical attendance for his servant, who has met with an accident in his service. 3 B. & P. 247.

If a servant sell a piece of cloth, and warrant it to be good, an action upon the warranty lies against the master. 11 Ed. 4, 6. So, if a goldsmith make plate, wherein he mingles dross, so that it is not according to the standard, and his servant sell it, an action lies against the master. Cro. Jac. 471. 2 Ro. Rep. 28. So, if the servant of a taverner sell corrupted wine, an action thereupon lies against the master, 9 H. 6, 53. 1 Ro. Abr. 95, but not against the servant. 1 Ro.

Abr. 95. So, if any attorney bring an action for a debt due to his client, but which his client had before released, no action lies against the attorney, but against the client only. 1 Mod. 209. But if a man send his servant to a fair to sell an unsound horse, and the servant without his directions warrant the horse to be sound, no action will lie against the master, unless fraud or covin upon his part can be shewn. 9 H. 6, 53. 1 Ro. Abr. 95. Fitz. Action sur le Case, 5. So where a jeweller sent counterfeit jewels abroad by his servant, for sale, without desiring him to conceal their being counterfeit, and the servant caused them to be sold as real jewels, the court held that no action for the deceit would lie against the master. 2 Ro. Rep. 5, 26, 27. Bridg. 125. Poph. 145. Crc. Jac. 469.

If a carrier's servant receive goods to be carried for hire, and the goods be lost or injured, the action lies against the master. Comb. 118. 1 Salk. 262. So, for all other injuries caused by a servant's negligence or unskillfulness, while employed in his master's service, the master is liable; as if a smith's servant prick a horse, in the shoeing of him; or a man receive an injury from the unskillfulness of a surgeon's servant: the action in these cases may be brought against the master. 2 Ro. Abr. 693. Cro. El. 181. 5 Co. (Pilkington's case). So, if a pawnbroker's servant lose a pledge, the action lies against the master. 2 Salk. 441. 2 L. Raym. 738. Holt, 642. So, if a servant when sent by his master with a bond, &c. to J. S., embezzle it, the master is answerable. Dy. 161 a pl. 48. In all these cases, however, the plaintiff has his option to proceed against the master or the servant: and therefore it has been holden that a servant is chargeable in trover although the act of conversion were done by him for the benefit of his master. 4 M. & S. 259.

For forcible injuries committed by the servant, if done wilfully, the action must be against the servant, and not against the master, 1 East, 106, unless the injury were done by the master's command or procurement, 4 Leon. 123. 3 Mod. 323, in which case the servant and master will be both liable; it being a general rule that where the master has no power to do a thing himself, whoever does it by his command is a trespasser as well as the master. 8 Ed. 4, 45. Per *Choke. 3 Lev. 352. If the master lock a man into his house, and give the key to his servant, and the servant knowing the man to be in the house detain him there, the servant is liable to an action as well as the master; but if the servant were not aware of his being in the house, the master alone is chargeable. 22 Ed. 4, 45. Per Jenny. But where the master commands the servant to do a lawful act, and the servant wilfully does more, and the excess is actionable; as if the master order his ser-

vant to remove a stranger from his (the master's) premises, and in doing so the servant beat and wound the stranger; no action for this battery and wounding can be brought against the master, but it lies against the servant only. *Skin.* 228.

But if a forcible injury arise from the negligence or unskilfulness of the servant, while employed in his master's service, and be not done wilfully, the action may be either against the master or against the servant. As if a servant, by unskilful driving or negligence, run his master's cart against another and damage the loading, or against a passenger and injure him, the action may be brought against the master, 2 *Salk.* 441. 1 *Vent.* 295. 2 *Lev.* 172. 1 *L. Raym.* 264, or against the servant; the only distinction is, that the action against the master must be an action on the case, 2 *H. Bl.* 442, 443.; and see 6 *T. R.* 659, that against the servant an action either of trespass or case, as the case may be. In these and the like cases, the action must be brought against the person for whom the servant was employed, or against the servant himself and not against the steward or agent who employed the servant. 6 *T. R.* 411. Where A. employed B. a surveyor, to repair his house, and B. employed C., D., and E. under him: the servant of E. having thrown some lime in the street, opposite to the house, whereby a stranger met with an injury: the court held that the stranger might bring his action against A.; for the servant of E. was employed in A.'s service, when he did that which was the cause of the injury. 1 *B. & P.* 404.

If commissioners appointed for the paving of a town, or for the execution of any other public duty, employ a surveyor and a contractor to do certain work, in the course of which, from the negligence of those engaged in it, a person meets with an injury: held, that the commissioners are not liable to be sued by the party injured, but that an action by him will lie against the contractor and surveyor. *Hall v. Smith et al.* 2 *Bing.* 156.

A factor in this country, who purchases goods for a person beyond seas, is personally liable for the value of them, and may be sued for them, as upon his own contract; *Bul. N. P.* 130. 1 *B. & P.* 368, per *Eyre*; and the principal in that case is only liable over to the factor. If money be paid by mistake to an agent, an action for money had and received may be maintained against him at any time before he has paid it over to his principal; *Cowp.* 566. See 5 *T. R.* 405. 5 *Bur.* 2639: but after he has paid it over, no action will lie against him, but against his principal only; 4 *T. R.* 553. 2 *Doug.* 696, n.; and in the case of a known agent, unless there be fraud or covin on his part, perhaps it is better to bring the action against the principal, even although the

money have not been paid over, see 4 Bur. 1984, as it is clear that the principal is liable, whether the money be paid over or not. If a broker draw a bill upon his principal for the amount of goods bought by him, he is of course liable in an action on the bill, if it be dishonoured. See 1 Marsh. 318. So, if he purchase in the name of J. S., but in reality upon his own account, he is liable. 15 East, 67. So, if he do not disclose the name of his principal at the time of making the contract, the seller may sue the broker or agent, or he may sue the principal (if he reside in this country,) at his *option, if he should afterwards discover him; 15 East, 62. See 3 Taunt. 493, 497; but if, at the time of the sale, he knew that the buyer, though dealing with him in his own name, was in truth the agent of another, yet if he then elected to give credit to the agent, he cannot afterwards maintain an action for the value of the goods against the principal. 15 East, 62. See 10 B. & C. 755.

So, where a man contracts with a surveyor to repair his house, and the surveyor orders the necessary articles from tradesmen, the tradesmen must sue the surveyor, and not the owner of the house; because in this case the surveyor is not the agent of the owner, but is a distinct contracting party. 15 East, 66. But if a factor or agent disclose the name of his principal, and the goods be sold on the credit of the principal, no action afterwards lies against the factor; it can be brought against the principal only. Yet exceptions to this rule may arise from the circumstances of the case; as if A., a merchant, purchase goods of B., for the use of C., who is present and selects the goods, and stipulates for the price and the other terms of the purchase, A. credits B. with the price, and debits C. with the price and a commission, and B. debits A. with the price in his books and invoices: B. cannot afterwards maintain an action against C. for the price of the goods; his only remedy is against A. 4 Taunt. 574. Lastly an officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity, 1 T. R. 172, even although he contract by deed. 1 T. R. 674.

The principal shall answer for his factor, in all cases where he is privy to the act of wrong. Molloy, 423. and where a factor beyond sea sold silk of an inferior quality as silk of a superior quality, it was holden that an action would lie against the principal in this country, although he was not privy to the deceit; for, per Holt, C. J., a merchant is answerable for the deceit of his factor, *civilliter*, although not *criminaliter*. 1 Salk. 269. If an agent, employed by the indorsee of a bill to get it discounted, warrant it to be a good one, his employer is bound by the warranty, and liable to pay the amount of the bill if dishonoured by the acceptor, unless at the time of employing the agent the principal

expressly stated that he would not warrant or indorse the bill. 4 T. R. 177.

As to officers and their deputies : by the general rule of *respondeat superior*, regularly all officers shall answer *civiliter* although not *criminaliter* for the acts of their deputies, as if they were their own ; therefore for all causes of action against sub-sheriffs or their officers, arising from the performance of their duties as such, the action must be brought against the sheriff. 4 Co. 33. 5 Co. 89. 2 Inst. 466. 2 Lev. 160 Dy. 278. 2 Jon. 62. 2 Mod. 124. 1 Ro. Abr. 94. See 3 Co. 72. Bac. Abr. Escape, E. 2. 7 T. R. 109. 8 T. R. 505. If a sheriff's officer take greater fees upon an execution than are allowed by law, an action upon st. 29 El. c. 4, lies against the sheriff. 2 T. R. 148. To make the principal answerable, however, the deputy must have been appointed by him ; and therefore the captain of a king's ship is not answerable for damage done to another ship through the negligence of his lieutenant. 15 *East, 384. And even in a case where it appeared they had the appointment of their deputies, being an action against the post-masters general for the loss of exchequer bills sent by the post, yet as their patents provided that they should be answerable for their own acts only, and not for those of their officers, the court held that the defendants were not liable for any misfeasance of their deputies. 1 Salk. 17. 143. Carth. 487. Cowp. 754 ; but the action should be brought against the person really guilty. 2 W. Bl. 906. 3 Wils. 443. In the case of sheriffs, it may be observed, that if the party for whom their officers act, make himself a party to the act complained of, he may be sued instead of the sheriff ; as if the plaintiff go with the officer whilst he levies on the goods of a defendant who is a bankrupt, 1 B. & P. 369, or upon the goods of a stranger ; or if he give a bond of indemnity for seizing and selling them : Bul. N. P. 41 : trover may be brought against the plaintiff, even although the money still remain in the hands of the sheriff's broker. 1 B. & P. 369.

A party who takes a share in a ship, under a conveyance which is void for want of conformity with the provisions of the registry acts, is not liable for articles furnished to the ship, unless credit have been given to him individually, or he have holden himself out as owner. *Harrington v. Fry*, 2 Bing. 179.

A ship owner is liable for necessary repairs done to a ship by the master's orders ; and " necessary repairs " mean such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, would order. *Webster et al. v. Seekamp et al.* 4 B. & Ald. 352.

As to the owners and captains of ships : where goods shipped on
[*62]

board a vessel for freight are lost or damaged, the action may be brought either against the captain, R. 1 Vent. 190, 238. T. Raym. 220. 2 Lev. 69. 1 Wils. 281. and see 10 East, 530, or against the owners of the ship, R. 3 Lev. 259. Carth. 58. 2 Salk. 440. 3 Mod 321. Skin. 279. 1 Show. 29: 101. Str. 816. 2 W. Bl. 947, in the same manner as against common carriers. See Bac. Abr. Merchant D. Where the commander of a ship of war took the bullion of a private merchant on board, it was holden that an action would lie against him for not safely keeping and delivering it. 4 Taunt. 787. So, for any damage done to another ship, &c. through the negligence or unskilfulness of the master or crew, while exercising their duties as such, the action may be brought against the owners, 2 New Rep. 182, or against the captain, 1 Taunt. 568, in the same manner as against a master for the act of his servant, as mentioned ante, p. 58; but if the tortious act which caused the damage were wilful, and did not arise from mere negligence or unskilfulness, he who did the act can alone be sued for it. 1 Taunt. 568. See 2 Ch. Ca. 239. For victuals or stores purchased for the ship by the captain, or for repairs done to her, the action may be brought against the owners, 2 Vern. 643. Cowp. 636. 11 East, 435, or against the captain. Cowp. 636. See Hob. 11. Moor, 918. But where goods are ordered by the owners, before the appointment of the captain, though some of them be not delivered until afterwards, yet as in this case no personal credit is given to the captain, no action will lie against him for the amount of them. 1 T. R. 108. So, if the goods be obtained upon the credit of the owners solely, though ordered by the master, the master will not be accountable. Hardw. 376. A person to whom a ship is mortgaged, however, if not in possession, is not liable for stores, &c. furnished for her. 1 H. Bl. 114. and see 7 T. R. 306. So, if the owner charter the ship to the captain at a rent for a certain number of voyages, the owner is not liable for stores furnished to the ship by order of the captain, during the charter-party. 13 East, 238. So, upon the sale of a ship, the vendor is not liable for *stores ordered by the vendee after the sale, although before the conveyance was perfected by registry; 8 East, 10; but for the stores ordered by himself, he is liable, although not delivered until after the conveyance is completed. 11 East, 435. For wages, the seamen may sue either the owners or captain, Abbot Sh. 431, and the captain may sue the owners. See 4 East, 43, n.

Tenant and Reversioner.] Real actions, as has been already mentioned, must be brought against the immediate tenant to the freehold; so that if the tenant in possession have an estate of freehold in the premises, the action must be brought against him; but if he be but tenant

for years, the action must be brought against the next remainder-man or reversioner who has a freehold interest. In ejectment, the declaration is always served upon the tenant in possession only. So personal actions for any thing relating to the lands are always brought against the tenant in possession, and not against the reversioner: thus, an action for not repairing fences, whereby the plaintiff was damaged, must not be brought against the owner of the fee who was not in possession, but against the occupier only. 4 T. R. 318.

Assignee.] A lessee may have an action of covenant against the assignee of the reversion, for the breach of any covenant running with the land: 1 Saund. 237; so may the assignee of the term. Ante, p. 46. So, the lessor or his assignee may have covenant against either the lessee or his assignee, at his election, upon a covenant running with the land, even although he have accepted the assignee of the term as his tenant. Cro. Jac. 521, 522. 5 H. 7, 19, a. 3 Co. 22 b. 24 b. Carth. 182, 183. 3 Mod. 337, 338. 1 Show. 199. Carth. 182. 1 Salk. 80, 81. 1 Saund. 240. So, the lessor or his assignee may maintain debt for rent against the assignee of the term, 5 H. 7, 19 a. 3 Co. 22 b. 3 Mod. 337, 338, or against the lessee himself, even for rent accruing after the assignment, unless the lessor or his assignee have accepted the assignee of the term as his tenant. 3 Co. 24 b. Cro. El. 715. Moor. 600. 1 Saund. 240. If the lessee have assigned a moiety of the land only, the lessor or his assignee may have debt against the assignee for a moiety of the rent, 2 Lev. 231. T. Jon. 104, or it seems he may have a joint action of debt against the lessee and assignee for the whole rent; Cro. Jac. 411; and the same of covenant. So, if the lessee assign to two distinct moieties of the premises, the lessor or his assignee may, it seems, sue each separately, or both jointly; but where the assignment is to two jointly of undivided moieties, the action must be against both jointly. *Vide post.* Care must be taken that the person sued be the assignee of the term, and not an underlessee merely; for the lessor or his assignee cannot have debt or covenant against an underlessee, there being no privity of either contract or estate between them.

In covenant by the assignee of the reversion against the assignee of the term, the declaration alleged that the lessor was seised, (without saying of what estate,) and being so seised, devised to the plaintiff in fee: held, that this was sufficient after verdict. *Harris et al. v. Beavan*, 4 Bing. 646.

Executors.] The executor or administrator may be sued for the debt of the testator or intestate, or upon any other of his contracts: see 2 Arch. Pr. C. B. 307; and post, B. 5 ch.—: debt on *simple con-

tract, indeed, formerly did not lie against an executor or administrator; 9 Co. 87. Cro. El. 600. Cowp. 375: but debt for rent, and assumpsit upon the simple contract of the testator, did; 9 Co. 87 b. Plowd. 180; and now, by 3 & 4 W. 4, c. 42, s. 14, debt on simple contract lies against an executor or administrator. And by the second section of the same statute, "an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his life-time to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." And even at common law, if the plaintiff's goods had been taken away by the testator, and still continued in specie in the hands of the executor, replevin or detinue would lie against the executor; W. Jon. 173, 174; or if they were consumed, then an action for money had and received lay to recover the value. Cowp. 377. But for any cause of action founded upon a *malfeasance* or misfeasance to the person or reputation of another, such as assault and battery, false imprisonment, slander, or the like, no action will lie against the executor. W. Jon. 174. Latch. 167, 168. T. Raym. 57. Palm. 330. Cro. Car. 540. 1 L. Raym. 433, 434. Cowp. 375. Where the executor of a lessee has assigned the term, the lessor or his assignee may still maintain either debt or covenant against the executor or the assignee of the term, at his option; but if he accept the assignee of the term as his tenant, he can no longer maintain debt against the executor for rent subsequently accruing. Cro. El. 715. Moor. 600, although he may maintain an action of covenant, if he wish it. And the same, if the lessee himself had assigned the term before his death. 1 Sid. 266. 1 Lev. 127. 3 Mod. 325. As to a feme executrix, see ante, p. 57; and as to the joinder of executors, see post, p. 69.

An action upon the bond, statute, or recognizance of the deceased, may be brought against either the heir or the executor of the deceased, at the election of the plaintiff. Bac. Abr. Heir, F.; see 2 Arch. Pr. C. P. 142. It cannot, however, be brought against the heir and executors jointly; 18 Ed. 3, 4; but if the lands descended be gavelkind, all the sons must be joined as defendants. 11 H. 7, 12.

Justices of Peace or Constables.] Before an action is brought against a constable for any thing done by him in the execution of his

duty, a demand should previously be made in writing, of the perusal and copy of the warrant under which he acted ; and if this perusal and copy be not given within six days after being thus demanded, you may bring the action against the constable. But if it be granted, you should bring the action against the justice of peace who signed the warrant ; for if you bring it against the constable, or against him *and the justice of peace jointly, he will be entitled to a verdict. 24 G. 2, c. 44, s. 6. See 2 Arch. Pr. C. B. 157.

Care must be taken that the defendant or defendants be correctly named in the writ and declaration. For although misnomer is no longer pleadable in abatement, yet the defendant may, upon summons, cause the declaration to be amended, and oblige the plaintiff to pay the costs. See *Longridge v. Brewer*, 1 Bing. 143. 3 & 4 W. 4, c. 42, s. 11. In actions upon bills of exchange, promissory notes, or other written instruments, however, wherein any of the parties are designated by the initials of their christian or first name, it will be sufficient to describe them in the same manner in the declaration. 3 & 4 W. 4, c. 42, s. 12. Care also must be taken not to declare against more defendants than are mentioned in the writ, otherwise the declaration may be set aside for irregularity ; 1 Arch. Pr. C. B. [18, 40] ; but it is no irregularity, seemingly, to declare against some of several defendants mentioned in non-bailable process, if the plaintiff have not previously declared against any of the others. Id. [19.]

2. Joinder of defendants.

Parceners.] If a parcener be sued alone, for any matter relating to the property in coparcenary, she may plead that there is another coheir not named ; Th. D. l. 5, c. 1, s. 2, 3, 5. Co. L. 164 a. ; although the other not named be within age ; or although the parceners be in by several descents. 42 Ed. 3. 17. 37 H. 6, 8. 9 Ed. 4, 13. Th. D. l. 5, c. 1, s. 7. So, in replevin, one parcener cannot avow for rent without the other. R. 1 Salk. 390, [but must avow in her own right, and make conusance as bailiff to the other, for the entire rent. Ante, p. 47.] But if one parcener entered by disseisin for herself and her sister : in an assize against her, it was no plea that her sister was not named ; for she could not be parcener with a disseisoress. 27 Ass. pl. 68. And after partition, they shall not be joined, even although one of them were within age at the time of the partition. 9 H. 6, 5. Th. D. l. 5, c. 1, s. 6. Com. Dig. Abatement, F. 4.

Joint-Tenants.] If a joint-tenant be sued alone, he may plead that he holds jointly with such a one, who is alive and not named : [Co. Lit. 180 b.] So, a man may plead joint tenancy with his wife, Th. D. l. 11,

c. 28, s. 2, 10, 12, though the wife die pending the writ ; for the death does not make a bad writ good. Th. D. l. 11, c. 28, s. 31. So, he may plead joint-tenancy with one who is named in the render of a fine, though he never had any thing in possession. § H. 4, 12. Com. Dig. Abatement, F. 5.

Also, one joint-tenant cannot avow alone for rent, R. 5 Mod. 73, or for damage feasant. 5 Mod. 151. So, in all personal actions relating to their joint property, they must be jointly sued. So, if joint-tenants refuse to set out their tithes, the action must be brought against them jointly ; but if one alone occupy the land, the action must be brought against him only ; or if one of them set out the *tithes, and the other take them away, the action must be brought against the wrong doer. Hut. 121. Cro. Jac. 86. 362.

Tenants in Common.] If one tenant in common be sued alone, in a personal action, without his co-tenant, for a matter touching the lands holden in common, he may plead in abatement that he held in common with such a person not named, the day of the writ purchased : [7 H. 5, 6, 6, Per Skrene. Bro. Action sur le Case, 32. Joint-tenancie 12. Clift. Ent. 7. pl. 16. Ib. 23 pl. 60. Lib. Plac. 2 pl. 11. 5 T. R. 651.] : As in trespass *quare clausum fregit, et herbam et blada consumpsit, &c.* See Lit. s. 323. But if a husband and wife and A. be tenants in common, and the husband die, and the wife bring dower against the heir before partition, it is no plea that the heir is tenant in common with A. and the demandant. R. 3 Lev. 84. Also, in replevin, tenants in common must avow severally for rent, 1 Salk. 390. 1 Jon. 253, but jointly for damage feasant. R. 1 Jon. 253. Com. Dig. Abatement, F. 6. If a lease for years be made to B. and C. rendering rent, and C. assign his moiety to D. ; if afterwards the rent be in arrear, the lessor may bring an action of debt for it against B. and D. jointly, for the reversion remains entire. Palm. 283. Also, if tenants in common refuse to set out their tithes, the action must be brought against them both ; but if one alone occupy the land, the action must be brought against him only ; or if one set out the tithes, and the other take them away, the action must be brought against the wrong-doer. Hut. 121. Cro. Jac. 86. 362.

Where mortgagor and mortgagee joined in a lease, containing a covenant by mortgagor only for quiet enjoyment : held, that no covenant by both for quiet enjoyment could be implied. *Smith v. Pocklington*, 1 Tyr. 309.

Where one of two chapel wardens gave orders to a tradesman or goods for the use of the church : held, that an action for the amount of them might be brought against him who gave the order, without making the other a party. *Shaw v. Hislop*, 4 D. & R. 241.

Joint Contractors &c] In actions *ex contractu*, the general rule is that the plaintiff must sue all the contracting parties; 1 B. & Pul. 73; even although one of them may have become bankrupt and obtained his certificate. 2 M. & S. 23. So, if one of the contracting parties be an infant, still he must be joined with the others as a defendant, although the case be such that his infancy will be a good plea in bar as to him: 3 Taunt. 307: unless indeed the contract be void as to the infant, and not merely voidable, as in the case of a bill of exchange or the like; in which case the plaintiff may declare on the bill, as accepted, &c. by the adult defendant in the names of him and of the infant; and if the defendant plead the nonjoinder in abatement, the plaintiff may reply the infancy of the other contracting party, and it will be no departure. 4 Taunt. 468.

Therefore, in covenant, the action must be brought against all the covenantors jointly, if the covenant be joint and not several; but if the covenant be joint and several, the covenantee has his option of bringing the action against all the covenantors, or against any one of them, even although they be jointly interested in the subject-matter of the covenant. 2 Bur. 1190. 1 Str. 553. 8 Mod. 166. 1 Lutw. 696. 1 Saund. 154. (n. 1.) Also if two lessees covenant jointly and severally, and one of them die even before the commencement of the term, still the covenantee may bring his action against the survivor jointly with the executor of the deceased, notwithstanding the whole interest have survived to the surviving lessee. 2 Bur. 1197.

*So, where two persons have been made joint receivers, account cannot be brought against one only. 10 Ed. 4, 5.

So, one person alone cannot be sued in debt upon a joint contract, 20 H. 6, 11. 9 Ed. 4, 24, b, unless the other be dead, and his death be averred in the declaration. So, if debt on bond be brought against one alone of two obligors, the defendant may set out the bond on oyer, and plead the nonjoinder in abatement; 28 H. 6, 3, 11. Bro. Plead. 139, Brief. 27. Fitz. Dette, 51. Cro. El. 355, 461, 424, 544. 1 Lutw. 696 Ast. Ent. 7; but if the other obligor be dead, that fact should be averred in the declaration, Sty. 50, and the action be brought against the survivor alone. If however the bond be joint and several, the obligee has his option to sue all the obligors, or any of them; but if, for instance, there be three obligors in such a case, he cannot sue two of them jointly, but must treat the bond as a several bond, and sue each of the obligors separately, or as a joint bond, and sue them all jointly. 10 H. 7, 16. Bro. Obligation, 94. 12 H. 4, 21 b. pl. 12, Bro. Dette, 69. 3 T. R. 782. 1 Saund. 291 e. Debt on judgment must be brought against all the parties against whom the judgment was obtained. R. 2 Leon.

220. And even in debt on stat, 9 Ann. c. 14, to recover back money won at play, it has been decided that the defendant may plead in abatement that the money was due from others not named, as well as from himself. 7 T. R. 257. But generally in debt on a penal statute for a penalty, it is otherwise.

So, in assumpsit, if the contract be joint, the action must be brought against all the persons who, either expressly or by implication of law, made it, whether the consideration be joint or several; or if one of them be dead, then, upon suggesting that fact in the declaration, the action may be brought against the survivor alone. R. 2-Mod. 280.

So, in detinue upon a bailment to two, the action must be brought against both. 7 H. 4, 6.

Also, in actions which, though *ex delicto* in form, are *ex contractu* in substance, the same persons should be made defendants as if the form of the action were *ex contractu*. Thus, in an action on the case against a carrier, for not safely carrying goods, it has been decided that the defendant might plead in abatement that his partners were not sued. 6 T. R. 369. So, in case against one of several joint-owners of a ship, for not safely conveying goods which had been delivered to him for that purpose, it was holden that the defendant might plead in abatement that the goods were delivered to him and his partners jointly, and that his partners were not named. 2 New Rep. 365. R. 2 Salk. 440.

In an action on the case against a coach proprietor, for an injury sustained by a passenger through the negligence, &c., of the defendant and his servants, it was holden that defendant could not plead in abatement the nonjoinder of the other proprietors of the coach; the action being in tort, nonjoinder could not be pleaded. *Ansell v. Waterhouse*, 6 M. & S. 385.

Lastly, as to the actions *ex delicto*: it is a general rule that in all such actions the plaintiff has his option to sue all the persons who have been guilty of a joint tortious act against him, either in one action jointly, or in separate actions against each. 4 B. & P. 73. 6 Taunt. 29. Therefore, for a joint trespass, the plaintiff may sue all the trespassers jointly; Latch. 262; or he may sue each separately; and it will be no plea that there is another joint trespasser not named. 14 H. 4, 21. 11 H. 7, 6. So, if two persons procure a man to be indicted falsely, he may have a joint action against both, Latch. *262, or separate actions against each. So, if two conspire to maintain a suit, a joint action will lie against both, although one only gave the money; Bro. Joinder in Action, 47. Fitz. Maintenance, 15; or separate actions may be had against each. So, a joint action may be maintained against all the coroners of a county, for a false return to a *capias ulagatum*;

Freem. 191. See Carth. 171 ; or against all the bailiffs, &c. of a borough, for refusing the inspection of books, contrary to stat. 3 G. 3, c. 15, although the statute give the action against the "mayor or bailiff," &c. in the singular number ; for the breach of trust in one is a breach of trust in both, they being in law but one officer. Cowp. 192. But a joint action cannot be maintained against several persons for speaking the same words ; because the words of one cannot be the words of the other. Palm. 313. Cro. Jac. 647. 1 Bulst. 15. And see Sty. 349. Nor can you bring a joint action against two, and declare against one of them for an assault and battery, and against another for taking away your goods ; because the trespasses are of several natures, by different persons, and are several distinct causes of action. R. Sty. 153.

In ejectment, the action is always brought against the nominal ejector, but copies of the declaration must be served upon all the tenants in the occupation of the premises. See 2 Arch. Pr. C. B. 36, &c.

In *quare impedit*, the action is brought against the bishop alone, when the delay or cause of complaint arises solely from him, by his refusing to admit and institute a clerk, upon pretence of incapacity or the like. But where the refusal or delay arises from an adverse presentation, then the action should be brought jointly against the bishop, the pretended patron, and his clerk : against the bishop, to prevent his presenting by lapse ; against the pretended patron, for it is his right the action is brought to try ; and against the clerk, for if instituted, he cannot be removed unless he be made a party. It may however be brought either against the patron and clerk jointly, or against the patron alone.

Bail.] In an action of debt on a bail-bond, all the parties may be jointly sued, or separate actions may be brought against each ; for the bond is joint and several. So, in debt upon recognizance of bail, the action may be brought against both of the bail jointly, or separate actions may be brought against each. And in these cases, if it be doubtful whether one of the bail can be served with process, it is better to sue them separately. So a *scire facias* upon a recognizance of bail, may be brought against both the bail jointly, or against each separately, because the recognizance is joint and several ; but the joint *scire facias* is the most usual.

Partners.] In actions against partners on a partnership account, all the partners must be made defendants, 5 Bur. 2611. 2 W. Bl. 947, even although one of them may have become a bankrupt, and obtained his certificate. 2 M. & S. 23. And even where a contract was made by two partners to pay a sum of money to a third person, "*equally out of their own private cash*," the court held that they should be jointly sued upon it. 1 H. Bl. 236. So, although one *of the partners be an infant,

yet he must be joined as a defendant, 3 Taunt. 307, unless in actions upon such contracts, as, if made by infants, are void, and not merely voidable; as upon a bill of exchange, &c., in which case the plaintiff may declare upon it as accepted, &c. by the adult partner in the names of both. 4 Taunt. 468. If one partner be dead the action must be brought against the survivor alone, without joining the executor of the deceased partner; because although the executor is liable over for a moiety of the debt, &c. to be recovered, yet as the judgment against him would be different from that against the surviving partner, the one being *de bonis testatoris*, the other *de bonis propriis*, he cannot be joined as a defendant. Carth. 170, 171. 3 Lev. 290. 2 Lev. 228. Fortesc. 181. And the surviving partner in such a case may be sued as in his own right, without stating him to be the surviving partner; 2 T. R. 479, cit.; and therefore where the declaration contained but one set of counts against the defendant in his own right, the court held that the plaintiff might recover for a demand against the defendant in his own right, and also for a distinct demand against him as the surviving partner of another. 1 Barn. & Ald. 29. As to dormant partners, it seems they must be joined as defendants, (although not as plaintiffs, see ante, p. 52,) otherwise the defendant may plead the non-joinder in abatement. 1 Marsh. 246; for it is fair that the defendant should have an opportunity in this manner, of making his partner contributable to the debt or damages to be recovered. And it is very clear that a plaintiff may join a dormant partner as a defendant, if he can prove him to be such. 7 East. 209. And see 1 H. Bl. 37. 1 M. & S. 412. But the action should be brought against such persons only as were partners when the contract was made, and not merely at the time of the action brought. 4 Taunt. 582. 1 East, 48. See 1 Marsh. 246.

Executors.] In actions against executors, you may make all those defendants who are named as executors in the will, whether they have proved the will or not; but all those who have proved the will, R. 1 Lev. 161. D. 9 Co. 37 b. Clift. 15. R. in Exchequer, M. 13 G. 1. Rast. Ent. 325 a; and also in actions against administrators all who have administered. Rast. Ent. 324 c, must be made defendants, otherwise the non-joinder may be pleaded in abatement. But for an act done by one of the executors only, an action may be maintained against him alone: as in detinue of charters, where the charters came to the hands of one of the executors only; Th. D. l. 5, c. 12, s. 1; or in dower against one executor only, as guardian, who alone possessed the ward. 8 Ed. 3, 420. Th. D. l. 5, c. 12, s. 3. So, if one of the executors die, the action must be brought against the survivor alone, without joining the executors of the executor who died. Th. D. l. 5, c. 12, s. 5. R. 4

Leon. 193. So, in an action against an executor, you cannot join the heir, 18 Ed. 3, 4. Th. D. l. 5, c. 12, s. 2, 7, or terre tenants. 27 Ed. 3, 80. Th. D. l. 5, c. 12, s. 7. Com. Dig. Abatement, F. 10.

Non-joinder.] In actions *ex contractu*, brought against some only *of several persons who should have been jointly sued, the defendants must plead the non-joinder in abatement, there being no other way of taking advantage of it, 5 Bur. 2611. 2 W. Bl. 947. 5 Co. 119. 1 Str. 503. 1 Saund. 291 c. 154, (n. 1,) even in the case of a bill of exchange or promissory note. 1 Barn. & Ald. 224. So, in debt on bond, if the bond be joint and several, and two only of three obligors be sued, the defendants must plead the non-joinder in abatement. 10 H. 7, 16. 27 H. 8, 6, pl. 29. 1 Saund. 291 e. If indeed in debt on bond, it appear upon the face of the declaration that another obligor, not named, also sealed the deed, and that he is alive, the court will arrest the judgment, 1 Saund. 291 b, or the defendant may plead the non-joinder in abatement, at his option; 2 Taunt. 254; but it is no ground of nonsuit, on the plea of *non est factum*. Id.

So, in actions *ex quasi contractu*, in which (as already mentioned, ante, p. 67,) the same persons must be made defendants as if the action were in form *ex contractu*, the only mode of taking advantage of a non-joinder is by plea in abatement. Carth. 62, 63. 6 T. R. 369. 2 New. Rep. 365, and see 2 Salk. 440.

In actions *ex delicto*, which we have seen (ante, p. 67,) may be brought against all or any of the persons who jointly committed the injury, non-joinder of course cannot be pleaded in abatement, or taken advantage of in any other way. But where such an action is brought against a tenant in common, joint-tenant or co-parcener, for any thing respecting the land held in common, &c. in which case all the tenants in common, &c. we have seen (ante, p. 65, 66,) should be jointly sued, the non-joinder should be pleaded in abatement.

In actions against executors, as you are compellable to join only those who have administered, a plea in abatement for non-joinder must therefore aver that the executor omitted had administered. Bro. Executors, 20, 88. 1 Lev. 161. Went. Ex. 25. Clift. Ent. 15, pl. 36, 37. Lib. Plac. 1, pl. 8. 1 Saund. 291 g.

By 3 & 4 W. 4, c. 42, s. 8, "no plea in abatement for the non-joinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea." See *De Mautort v. Saunders*, 1 B. & Ad. 398.

And by s. 9, "to any plea in abatement in any court of law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors."

And by s. 10, "in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement or any subsequent plea in abatement are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment or to a verdict and judgment, as the case may be, against the defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any such defendant who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."

And by Rule Pl. H. 4 W. 4, 11, s. 20, if after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to a trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

(Venue.) A. B. by E. F. his attorney [or in his own proper person,] complains of C. D. and G. H. who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. &c. [The same form to be used, *mutatis mutandis*, in cases of arrest or detainer.]

Mis-Joinder.] In actions *ex contractu*, if persons be joined as defendants, who should not, advantage may be taken of the mis-joinder at the trial upon the general issue: or if it appear upon the face of the declaration, the defendants may demur generally, or move in arrest of

judgment, or bring a writ of error. The same rule also applies to actions *ex quasi contractu*, such as actions against carriers, 2 New Rep. 454. But see 3 East. 62, or actions upon a warranty, 12 East. 452, or the like.

In actions *ex delicto*, mis-joinder cannot in general be objected to; but the effect of it will be that the parties, who should not have been included in the action, will be entitled to a verdict at the trial. Yet where the tort could not be joint, as in an action for words against two, the defendants may take advantage of the mis-joinder either by demurrer, 1 Ro. Abr. 781, O. pl. 1. Sty. 349, or by motion in arrest of judgment. Palm. 313. Cro. Jac. 647. 1 Bulst. 15.

In real actions, the defendants may plead several tenancy, entire tenancy, or non-tenure, in abatement. See Com. Dig. Abatement, F. 12, 13. 14.

As to the cases in which mis-joinder may be aided by the entry of a *Nolle Prosequi*, see 2 Arch. Pr. C. B. 256.

*Having thus ascertained whether the party, who has received the injury may sue, and whether the person, who has committed it, may be sued; having ascertained the form of action to be adopted, and that the time limited for bringing such an action has not elapsed; and having satisfied yourself as to the persons who must be made plaintiffs and defendants to the action: the next step is to sue out process, in order to bring the defendants before the court; after which you may prepare the declaration and other pleadings to issue, and the evidence necessary to support them, according to the rules laid down in the remainder of this work.

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* BOOK I.

PLEADING AND EVIDENCE GENERALLY.

PART. I.

PLEADING GENERALLY.

CHAPTER IV.

THE DECLARATION.

SECT. 1. *The Commencement.*

2. *Statement of the Cause of Action.*

1. *The Matter to be stated.*

2. *The Manner of stating it.*

3. *The Conclusion.*

4. *Joinder of Counts.*

5. *Defects, in what Cases aided.*

SECT. I.

Commencement of the Declaration.

A DECLARATION may be divided into three parts:—The Commencement—The statement of the cause of action—and the conclusion. These shall be treated of in the first three sections of this chapter; in the fourth section, we shall treat of the joinder of counts; and in the fifth, of the manner in which defects in the declaration may be aided.

By Reg. Gen. M. 3 W. 4, s. 15, every declaration shall in future be intituled in the proper court, and of the day of the month and year in which it is filed or delivered, (see also Reg. Pl. H. 4 W. 4, l. s. 1,) and shall commence as follows:—

DECLARATION AFTER SUMMONS.

Venue. *A. B., by E. F. his attorney [or in his own proper person] complains of C. D., who has been summoned to answer the said A. B., &c.*

*DECLARATION AFTER ARREST, WHERE THE PARTY IS NOT IN CUSTODY.

Venue. *A. B., by E. F. his attorney [or in his own proper person] complains of C, D., who has been arrested at the suit of the said A. B., &c.*

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DECLARATION WHERE THE PARTY IS IN CUSTODY.

Venue. *A. B. by E. F. his attorney [or in his own proper person] complains of C. D., being detained at the suit of the said A. B., in the custody of the sheriff [or of the marshal of the Marshalsea of the Court of King's Bench, or of the warden of the Fleet.]*

DECLARATION AFTER THE ARREST OF ONE OR MORE DEFENDANT OR DEFENDANTS, AND WHEN ONE OR MORE OTHER DEFENDANT OR DEFENDANTS SHALL HAVE BEEN SERVED ONLY AND NOT ARRESTED.

Venue. *A. B., by E. F. his attorney [or in his own proper person] complains of C. D., who has been arrested at the suit of the said A. B. [or being detained at the suit of the said A. B. as before] and of G. H., who has been served with a writ of *capias*, to answer the said A. B., &c.*

And by Reg. Gen. H. 2 W. 4, r. 4, in all personal and mixed actions the writ shall not be repeated in the declaration, but only the nature of the action stated, in manner following: viz. "A. B. was attached to answer C. D. in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs." This rule, being made before the one above mentioned, is not strictly applicable to the above forms of the commencement of declarations; but the courts will require it to be so far observed in substance, that the writ shall not be recited in the declaration, but that merely a short statement of the cause of action may be added to the above forms, thus: "*in a plea of trespass*," "*in a plea of trespass and ejectment*," "*in a plea of trespass on the case*," "*in a plea of trespass on the case on promises*," "*in a plea of debt*," "*in a plea of breach of covenant*," "*in a plea of detinue*;" and even this does not seem to be actually required. If stated, however, a mistake in the form of action stated will be an irregularity only, and not matter of special demurrer. *Anderson v. Thomas*, 9 Bing. 678.

As the title of the declaration, and the venue, form material parts of the commencement of the declaration, we shall consider these separately.

The Title.] The title of a declaration consists of two parts: the title of the court in which the action is brought; and the time at which the declaration is filed or delivered. And by Reg. Gen. M. 3 W. 4, s. 15, already mentioned, every declaration shall in future be intituled in the proper court, and of the day of the month and year in which it is filed or delivered. See also Reg. Pl. H. 4 W. 4, l. s. 1.

Declarations in the Courts of King's Bench, Common Pleas, and Ex-

chequer, are intituled of these courts respectively, "*In the King's Bench*," "*In the Common Pleas*," "*In the Exchequer of Pleas*."

As to the day and year of which the declaration is to be intituled, it is clear that no action should be commenced until the cause of action for which it is brought has accrued. Therefore a man cannot declare the 16th May, upon a promise made on the 4th to pay on the 19th of the same month. R. 2 Cro. 70. Yelv. 70. Cro. Car. 575. So, in debt upon a bond for performance of covenants, if a breach be assigned for a time after the action commenced, it will be bad. R. 1 Sid. 307. So, if a man agree to give 30s. per annum for a house, no action will lie for rent, until a year's rent is due, because the rent is payable yearly; and if an action be brought for 45s. for a year and a half, and entire damages given, it will be bad for the whole. R. Lit. 61. So, a *quare impedit* brought the 9th May, where it afterwards appeared from the replication that the disturbance was on the 29th May, was holden bad. R. Hob. 198. And the same, where in an action on the case for a malicious indictment, the acquittal of the plaintiff was stated to have been on a day subsequent to the day of which the declaration was intituled. R. Carth. 114. Com. Dig. Action, E. In ejectment, however, the declaration may be, and usually is, intituled of a day prior to the demises therein stated; for by the terms of the consent-rule the tenant is precluded from taking any advantage of it. Run. Ej. 208. and see 1 Sid. 432. 1 Vent. 135.

Where a ship, on her voyage, put into a port to repair, and a shipwright was employed, who undertook to put her into thorough repair; after proceeding to a certain extent with the repairs, the shipwright refused to complete them until he should be paid for the work already done; this was refused, and he therefore brought an action to recover the amount: the court held that he might do so, without completing the repairs; if it were a contract to do a specific work for a specific sum, it might be different. *Roberts v. Havelock*, 3 B. & Adol. 404.

Also upon an entire contract for payment at several days, no action [of debt] will lie until the last day be past; as if a man be bound by an obligation or contract to pay 100*l.* at five several days, debt does not lie until after the fifth day. Co. Lit. 222, b. D. 3 Co. 22 a. [So, the payee of a promissory note payable by instalments, cannot bring debt against the drawer, until the last instalment has become due. 1 H. Bl. 547.] So, if a man lease a stock of cattle or goods for years, rendering rent at several days, debt does not lie for it until all the days have past. 3 Co. 22. But it is otherwise if the contract be several in its nature: as if a man lease land, rendering rent at several days, debt lies after each day; for the rent issues out of the land, and the contract follows the

land. Co. L. 47 b. 292 b ; 3 Co. 22 a. So, if lessee for years assign his term to him in the reversion, rendering rent, which is in law a surrender, and the rent not good by way of reservation but by way of contract only, yet debt lies after each day of payment. R. 2 Lev. 80. 1 Vent. 242, 272. So, if the remedy be several in its nature ; as if a man be bound by a recognizance to pay 100*l.* at five several days, he may have execution for each sum after each day ; for it is in the nature of several judgments. Co. Lit. 292 b. So, if the party agree that, if he fail in payment at the first day, he will pay the whole, debt lies for the entire after default on the first day. R. 1 Lev. 208. R. 2 Mod. Ca. 56, 57. So, upon a bond in a penal sum, conditioned to pay 5*l.* per annum, R. 3 Lev. 383, [cr to pay money at several payments, 1 Wils. 80.] debt may be brought after the first default ; for a default in any one payment is a breach of the condition of the bond. [See 6 T. R. 399.] So, if a man covenant to do a thing at several times, covenant lies upon every default. Co. Lit. 292 b. So, if a man contract to pay at several days, assumpsit lies for non-payment after the first day : Co. L. 229 b. R. cont. 3 Leon. 4 ; [the distinction being between debt, which cannot be brought in such a case, until after the last day of payment, and covenant and assumpsit, which *may.] As, upon a bargain to deliver twenty *quarteria tritici* every year during his life, assumpsit lies for a default at the first year, though debt does not. 4 Co. 94 b. Dy. 113 a. So, upon an agreement to pay 4*l.* by 5*s.* a month, assumpsit lies upon a default each month. R. per. three J. 2 Cro. 504. [Even on a promissory note for the payment of money by instalments, assumpsit lies upon every default. Andr. 370.] So, upon an agreement for thirty tons of strong beer, and to pay 4*l.* for each ton, an assumpsit lies for the 4*l.* for so many tons, when they are delivered. R. 1 Rol. 29, l. 30. [But if by this is to be understood that an action can be maintained before the whole thirty tons are delivered, the authority of the case may be doubted ; for the contract seems to be entire, and not divisible. See 2 New Rep. 61. 2 B. & P. 565.] Upon an agreement to pay 15*l.* yearly for four years, if A. enjoy certain land, an assumpsit lies for each year A. enjoys, before all the years have elapsed. R. Cro. El. 118. R. 1 Rol. 30, l. 5. Upon an agreement to pay 100*l.* upon a marriage, at five several payments of 20*l.* each, at several days, an assumpsit lies after each day. D to be so R. Cro. El. 118. Mo. 13, cont. R. acc. 1 Rol. 29 l. 20, 35. R. Cro. El. 776, 807. R. 2 Saund. 337. Upon a promise to pay rent *annuatim* at Michaelmas and the Annunciation, assumpsit lies after each feast. R. 2 Leon. 107. So, if there be a contract to deliver so much corn before Michaelmas, for so much the comb, to be paid for upon the delivery of the last corn, and the party delivers

only part of the corn, yet an *indebitatus* assumpsit lies for so much delivered after Michaelmas; for though the agreement was entire, the several delivery makes several contracts, and the defendant has a remedy for the residue. Per Hale, at Norfolk Ass. 1662, *between Baker and Sutton*. [*Vide supra*.] And damages given in an assumpsit upon the first default, are no bar in an assumpsit upon default at the other day; for the whole damages shall be intended to have been given for the default at the first day. Q. Dy. 113. R. Cro. Car. 241. 1 Rol. 29, l. 40. D. 2 Saund. 387. Com. Dig. Action, F.

Formerly the declaration must have been intituled of the term the process was returnable, 3 T. R. 624, particularly if intended to be delivered or filed *de bene esse*; but this is no longer necessary, or indeed practicable. A plaintiff, however, cannot declare until after eight days from the service or execution of the process; see 2 W. 4, c. 39. s. 11: nor after a year from such service or execution, for he will then be out of court; see Reg. Gen. H. 2 W. 4. And see Arch. Pr. C. B. [67, 68]; and of course the declaration must be intituled accordingly. Also, a declaration cannot be intituled of any day between the 10th of August and 24th of October, for by 2 W. 4, c. 39, s. 11, no declaration shall be delivered or filed at any time between those days. And where an action *ex contractu* is brought against two or more defendants, and one of them is outlawed; as the plaintiff in this case cannot declare against the defendants who have appeared, until the outlawry of the other is completed, 2 W. Bl. 759. And see 2 New Rep. 404. 1 Wils. 242, the declaration must be intituled of a day subsequent to the completion of the outlawry. 1 East, 133.

Formerly the declaration was intituled either generally of the term, or specially of some particular day in it. But it must now, in all cases, be specially intituled of the day and year on which it is delivered or filed. Reg. Gen. M. 3 W. 4, s. 15. Reg. Pl. H. 4 W. 4, l. s. 1.

If the action were commenced before the cause of action accrued, the defendant may plead that matter in abatement; Com. Dig. Abatement, G. 6; or if it appear in evidence at the trial, the plaintiff must of course be nonsuit. Or if it appear upon the face of the declaration, that the cause of action accrued after the commencement of the action, the defendant may demur; 1 T. R. 116; or, it seems, it may be moved in arrest of judgment, 2 Lev. 197. Carth. 114. See 1 Show. 147, or assigned for error. R. Cro. El. 325. R. 2 Cro. 70. Com. Dig. Action, E. It is much safer, however, to demur, as it may be doubted whether this be not a jeofail, cured after verdict by stat. 5 G. 1, c. 13, see Andr. 248, although not perhaps by any of the previous statutes of jeofails. See Cro. El. 325. Cro. Car. 272, 282, 575. 1 Show. 147. Jon. 304.

The Venue.] The venue is the county from which the jury are to come, who are to try the issue. Formerly the jury must have come from the town, parish, hamlet or place, in which the issuable matter in the declaration was alleged to have occurred; Co. Lit. 125 a; but by 4 Ann. c. 16, (extended to the trial of issues on penal statutes by 24 Geo. 2, c. 18,) the *venire facias* shall now be awarded of the body of the proper county where the issue is triable.

Every action for recovery of the seisin or possession of land [such as real actions and ejectment,] shall be brought in the county where the land lies. Bract. 189, 414. Com. Dig. Action, N. 1. So every action in which the issue may arise upon the land, must be brought where the land lies; as formerly a right of ward of land; 7 Co. 2 b; intrusion of ward, though the refusal or seigniorship be in another county; 7 Co. 2 b; right of ward of the body, for that savours of the land; 7 Co. 2 b; writ of forfeiture of marriage, for that supposes an intrusion upon the land; 7 Co. 3 a; writ *de valor maritagii*, 7 Co. 8 a, unless there was a tender and refusal of marriage, in which case it must be brought where the refusal was. 7 Co. 3 a. So a *quare impedit* shall be brought where the church is, except in the case of the king. 7 Co. 3 a. So a *quare impedit* of a prebend shall be brought in the county where the cathedral is, for the prebendary shall be installed there. 7 Co. 3 a. R. Dy. 194 b. Com Dig. Action, N. 4. So, trespass *quare claudum fregit* must be brought in the county where the land lies. 1 Bac. Abr. Action, loc. *et trans.* A. So, the action of replevin: So the action on the case for a nuisance is local, and must be brought in the county where the land lies. 1 Taunt. 379. 2 East. 497. See 6 Taunt. 29. And because the action in these instances is local, and must be brought in the county where the land lies, it is, that no action can be brought in England, to recover the seisin or possession of land out of it, or for a trespass or nuisance to such land. 4 T. R. 403. Where the land lies in this country, however, the court may, upon the application and with the consent of the parties, allow the trial to be in a different county from that in which the land lies, or in which the action is brought, a suggestion to that effect being entered upon the record. 3 & 4 W. 4, c. 42, s. 22. Vide post, p. 80. T. Raym. 372. See *1 Bol. Rep. 28. Hob. 5. 1 Arch. Pr. C. B. 84. Or if the land lie in two counties, the action may be brought in either; 7 Co. 3 a; or it may be laid in both; in which latter case the *venire* shall be directed to the sheriffs of both counties, who shall summon six of each county. Cro. El. 646, 741. See *trial per pais* 103. Also, an assise lay at common law *in confinio comitatus*, for common of pasture, turbary or piscary in one county, appendant or appurtenant to land in another county; Co.

Lit. 154 a. F. N. B. 180 a; so, for a nuisance in one county to land in another, Co. Lit. 154 a. [See 6 Taunt. 29.] So, by stat. 7 Ric. 2, c. 10, an assise lay in *confinio comitatus*, for rent issuing out of land in different counties, Co. Lit. 154 a. F. N. B. 180 A, even if there were twenty counties intervening, or the land lay in twenty counties. Co. Lit. 154 a. Com. Dig. Action; N. 3. Doct. Plac. 253.

But an action for trespass to the person or personal property of an individual, Ord. Car. 444. Co. Lit. 282, trover, and the action on the case for deceit, or for other misfeasance, malfeasance or non-feasance, Co. Lit. 282. 1 Wils. 336, are transitory, and may be brought in any county, at the option of the plaintiff; because the injuries for which they are brought might have happened in any county. And therefore it is that an action of trespass will lie in this county, for an assault and false imprisonment abroad. Cowp. 161: But an action for a breach of the customs of a particular town is local; for the cause of action must have occurred there. 2 W. Bl. 1068.

All actions *ex contractu*, as assumpsit, account, debt, covenant and detinue, are also transitory, and may be brought in any county, Co. Lit. 282. 2 Inst. 231. 7 Co. 3 a, even although the debt were contracted, or the contract made and broken, abroad; 1 Str. 612. Co. Lit. 281. Latch. 4. 6 Mod. 228, 2 Salk. 659, 660; for *debitum et contractus sunt nullius loci*. Debt and covenant by lessor against lessee, and covenant by lessee against lessor, are transitory, and may be brought in any county, because brought by and against the contracting parties themselves; 7 Co. 2 a. R. 2, Cro. 142; and this even although the lands be out of the kingdom. 6 Mod. 194. 2 Salk. 651. 2 Str. 776. Carth. 132. 6 Mod. 194. So covenant by the assignee of the reversion against the lessee, or by the lessee against the assignee of the reversion, is transitory, and may be brought in any county; for although not between the original contracting parties, yet as the stat. 32 Hen. 8, c. 34, transfers the privity of contract as to covenants to the assignee, he may bring his action in any county, in the same manner as the lessor might. 1 Saund. 237, 244 b. 1 Lev. 259. But debt by the assignee of the reversion against the lessee, is local, and must be brought in the county where the lands lie; because it is founded upon the privity of estate, and not upon the privity of contract. R. Cro. Car. 184. Semb. Cro. Car. 143. R. Jon. 43. So, debt or covenant by the lessor against the assignee of the term, Carth. 182, 183. Jon. 43. 1 Wils. 165, or by the executor of the lessor, Hob. 87, or covenant by the assignee of the term against the lessor, 5 Co. 17 a. F. N. B. 146 C, is local, and must be brought in the county where the lands lie. So debt or covenant by the assignee of the reversion against the assignee of the term,

3 Mod. 337, 338. 1 Show. 109. Carth. 182. 1 Salk. 80, 81, or *covenant by the assignee of the term against the assignee of the reversion, 5 Co. 17 a. F. N. B. 146 C, is local, and the venue must be laid in the county where the land lies. Debt or covenant by the lessor against the executor of the lessee, for arrears of rent, &c. accrued in the testator's life-time, is transitory; but if brought for rent &c. accrued in the executor's time, it is local, because the executor is then chargeable as assignee. Latch. 262, 271. 3 Co. 24. 1 Sid. 266. 2 Lev. 80.

An action upon a bail-bond by the assignee, may be brought either in the county in which it was taken, or where it was assigned; in fact it may be brought in any county, if the declaration state the assignment to have been made in that county. 2 Str. 727. 2 L. Raym. 1455. Fort. 366. Debt or *scire facias* upon a recognizance of bail must be brought in Middlesex. See Reg. Gen. H. 2 W. 4, s. 80; 2 Arch. Pr. C. B. [12, 13.] Debt on a judgment of any of the superior courts at Westminster, must also be brought in Middlesex, where the record is. Mo. 884. Debt for a copyhold fine, should be brought where the land lies. Semb. Vid. Ent. 177.

Actions upon penal statutes must be brought in the county in which the offence was committed. St. 31 El. c. 5. 3 M. & S. 429. If a cheque be given for usurious interest, and a receipt taken for it, in the county of A., and the cheque be afterwards exchanged for money in the county of B., the usury is committed in the county of B., and the venue must be laid there. 2 B. & P. 361, and see 2 T. R. 238. 4 East, 385. An action on stat. 1 & 2 Ph. & Mary, c. 12, for driving a distress out of the hundred into another county, may be brought either in the county where the distress was taken, or in that into which it was driven. 2 Taunt. 252. See also Com. Dig. Action, N. 10.

Actions on penal statutes must be brought in the county in which the offence was committed, whether the offence be one of omission or of commission: and therefore, in an action against a clergyman for non-residence, the venue must be laid in the county where the living is situate, and where, of course, the non-residence occurred. *Whitehead v. Wynn*, 5 M. & S. 427.

In actions against justices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, portreeves, constables, tithingmen, churchwardens, overseers, or other persons acting in their aid or by their command, 21 Jac. 1, c. 12, s. 5, and in actions against officers of the customs, 24 Geo. 3, sess. 2, c. 47, s. 35, 39, and see 28 Geo. 3, c. 37, s. 23, or excise, 23 Geo. 3, c. 70, s. 34, or persons acting in their aid, for any thing done by them in execution of their respective offices, the venue must be laid in the county in which the facts complained of were

committed; otherwise a verdict shall be found for the defendant. And the same in actions against all other persons holding public employments, in or out of this kingdom, having thereby authority to commit to safe custody; or if the fact be committed out of the kingdom, the plaintiff may lay the matter as having been done at Westminster, or in the county in which the defendant shall then reside. 42 Geo. 3, c. 85, s. 6. See 2 Arch. Pr. C. B. 157, 158.

The venue is stated in the margin of the declaration, as in the above forms. Formerly a special venue was given to each material fact stated in the declaration and other pleadings, namely, the county in which such fact was said to have occurred. *Vide post*, and 3 M. & S. 148. And if the county so stated as special venue were different from that stated in the margin, it might be considered the venue, and the county in the margin be rejected as surplusage. *3 T. R. R. 387. Or if the place only, and not the county, were stated in the body of the declaration, this might be referred to the county in the margin, Barnes, 481. See Cro. Jac. 167, *contra*, even although the place were stated to be "in the county aforesaid," and another county had been before mentioned; 3 Wils. 340: 2 W. Bl. 847. Cro. El. 437, 405. Cro. Jac. 96, 618; for it was a general rule that the county in the margin might assist the plaintiff, but should never hurt him. 3 T. R. 387. But now, by Reg. Pl. H. 4 W. 4. l. s. 8, the county in the margin shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration or subsequent pleading: provided that in cases where local description is now required, such local description shall be given.

If no venue be laid, the defendant may demur, (see 1 Lutw. 235,) or it seems may plead that matter in abatement. Com. Dig. Abatement, H. 13. Where a wrong venue is laid in local actions, if it appear upon the face of the declaration, the defendant may demur; 7 T. R. 583—588. 2 W. Bl. 1070, and see 10 East, 350; or if it do not appear, the defendant may avail himself of it at the trial, and the plaintiff shall be nonsuit; or the defendant may plead the matter in abatement. Com. Dig. Abatement, H. 17. But the want of a right venue is aided after verdict by stat. 16 & 17 C. 2, c. 8, so as the cause were tried by a jury of the proper county where the action is laid, (and which is holden to aid the defect of a mistrial of a local action in a wrong county; 7 T. R. 583. 2 L. Raym. 1212. Willer. 431, and see 3 T. R. 387. 1 Saund. 247. L. Raym. 181.;) and after judgment by confession or default, by stat. 4 Ann. c. 16, s. 2. Barnes, 483.

By stat. 3 & 4 W. 4, c. 42; s. 22, reciting that "whereas unnecessary delay and expense are sometimes occasioned by the trial of local ac-

tions in the county where the cause of action has arisen." it is enacted "that in any action depending in any of the said superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place."

Formerly, if the venue in the declaration were not laid in the county into which the writ issued, the bail would be discharged. 3 Lev. 235, 245. But now, by Reg. Gen. H. 2 W. 4, s. 40, "a declaration laying the venue in a different county from that mentioned in the process, shall not be deemed a waiver of the bail."

The Commencement.] The commencement of a declaration comprises the parties' names, the mode in which the defendant has been brought before the court, and the form of action adopted.

Care must be taken that the names of the plaintiff and defendant be correctly stated in the declaration; otherwise, if either Christian or surname be omitted or mistaken, although the defendant *cannot now plead the omission or misnomer in abatement, yet he may, upon summons, cause the declaration to be amended, and oblige the plaintiff to pay the costs. 3 & 4 W. 4, c. 42, s. 11. But in actions upon bills of exchange, promissory notes, or other written instruments, wherein any of the parties are designated by the initials of the Christian or first name, it will be sufficient to describe them in the same way in the declaration. 3 & 4 W. 4, c. 42, s. 12. If the plaintiff and defendant be of the same name, it may be necessary to give an addition to one or both of them, for distinction's sake; see 2 Wils. 386; or, after naming them once, they may be called "Plaintiff" and "defendant" afterwards throughout the pleadings, without naming them by their Christian and surnames. 6 Taunt. 121. 406.

In actions by or against a corporation aggregate, they must be named correctly by their name of incorporation. Com. Dig. Abatement, E. 18. Bac. Abr. Corporation, C. 3. 2 Str. 787. 2 L. Rayn. 1515. Cowp. 26. So, if plaintiff or defendant have a name of dignity, as Earl, Baronet, Knight, Bishop, &c. it must be given to him, and correctly, in the declaration. Com. Dig. abatement, E. 20, F. 19. So if a party sue or be sued in *auter droit*, as executor, &c. or in right of his office, as sheriff, &c. the character in which he sues or is sued must be stated; Com. Dig. Abatement, E. 21, F. 20. *And see generally upon this subject,*

post, Ch. 7; and in this respect also the declaration should agree with the writ; for it is very doubtful whether, upon general process, the plaintiff can now declare in *auter droit*; or upon process in *auter droit* or *qui tam*, whether he can declare in his own right, whatever may have been the practice formerly. See 1 Arch. Pr. C. B. [19, 40, 70.]

In the number of plaintiffs and defendants, also, the declaration in bailable actions must correspond with the writ: if the writ be at the suit of one plaintiff only, and the declaration at the suit of two, the court will set aside the proceedings for irregularity; 1 B. & P. 383; or if the writ be against two defendants, and the declaration against one only, the court will also set aside the proceedings, 4 East, 589. 5 T. R. 722. 4 T. R. 695, 667. But see 2 New Rep. 98 even although the other defendant be out of the jurisdiction of the court, 1 M. & S. 55. Upon non bailable process, also, the plaintiff cannot declare against more defendants than are named in the writ, otherwise the declaration may be set aside for irregularity; 1 Arch. Pr. C. B. [19, 40, 70;] but it is no irregularity, seemingly, to declare against some of several defendants mentioned in non-bailable process, if the plaintiff have not previously declared against any of the others. *Id.* [19, 70.]

If there be two or more defendants, and one of them have been outlawed, it is necessary to mention the outlawry in the commencement of the declaration against the other; it may be thus: "*A. B. by E. F. his attorney complains of C. D., who has been arrested at the suit of the said A. B. by virtue of a writ of capias against him the said C. D. and one G. H., in a plea of trespass on the case on promises; and the said A. B. by his attorney aforesaid comes and gives the court here to understand and be informed that since the suing out of the said writ in this cause and before this day, to wit, on *——, the said G. H. was duly outlawed in this suit, as by the record of the said outlawry remaining in this court in full force more fully appears. And hereupon the said A. B. by his attorney aforesaid complains against the said C. D. in the plea aforesaid.*" For that, &c. See 1 East, 133. It is not enough to allege that G. H. was "in due manner outlawed," without adding "in this suit." 3 East, 144. The *prout patet* is unnecessary. 7 East, 50. See 15 East, 1. 4 Taunt. 299. 1 M. & S. 242.

One attorney only should be named in the commencement of the declaration, although he have several partners. Where the Christian name of the attorney was omitted, it was holden to be error: R. 1 Rol. 336; but in a recent case, where the words "and thereupon the said J. N. complains," were omitted altogether, it was holden to be no cause even of special demurrer. 1 B. & P. 366.

As to the statement of the form of action, see *ante*, p. 74.

SECT. II.

Statement of the Cause of Action.

1. *The Matter necessary to be stated.*
2. *The Manner of stating it.*

1. *The Matter necessary to be stated.*

Inducement.] The plaintiff's title to the thing sought to be recovered, is all that is necessary to be stated in a declaration. In order to state this, however, it sometimes becomes necessary to state the matter from which the title or case of action has originated, in order to render the subsequent statement of the cause of action itself clear and intelligible; thus in assumpsit for not performing an award, the declaration usually states that there were differences between the parties, and about what, before it proceeds to the statement of the plaintiff's title to damages, namely, the submission, promise to perform the award, and breach. So, in assumpsit for a wager, the declaration usually states the horse-race, or other matter from which the wager originated, before it sets forth the wager and non-payment of it. So, in assumpsit by an under-lessee against his lessor for the amount of ground rent he has been obliged to pay to the head landlord, it will be necessary to state the defendant's tenancy, in order to render the subsequent statement of the cause of action intelligible. In an action of debt on a bail-bond, the declaration states the delivery of the writ to the sheriff, and the arrest, before it states the bond, breach, and assignment. So, in debt on replevin bond, the declaration states the distress, and application to the sheriff to replevy, &c. before it states the bond, breach, and assignment. So, in debt on a deed, and in covenant, the declaration states the substance of the deed, generally, before it states the covenant and breach. So, in debt or case for an escape of a prisoner in execution, the declaration states the judgment in the original action, the *ca. sa.* thereupon sued out and delivered to the sheriff, and the arrest, or the *committitur* if the action be against the marshal, before it states the detention and escape; and in cause for an escape on mesne process, it states the original debt, the process sued out and delivered to the sheriff, and the arrest, before it states the escape. So, in case for an injury caused by the negligence of the defendant's servant in driving his waggon against the plaintiff's chaise, the declaration first states plaintiff's possession of the chaise, and defendant's possession of the waggon and horses, before it states

the accident and injury. So, in case for distraining for mere rent than was due, the declaration states the plaintiff's tenancy and rent, before it states the distress. In all these and the like cases, this inducement or conveyance to the action (as it is termed) is necessary, in order to render the statement of the plaintiff's title to damages, or in other words, his cause of action, which immediately follows it, clear and intelligible. There is another class of cases, however, in which the necessity of the inducement is not so obvious; namely, in actions for libel, verbal slander, and malicious prosecutions, in which the statement of the libel is prefaced with an inducement of the good character of the plaintiff, and of the good opinion his neighbours entertained of him on that account, &c. This is not necessary to elucidate any other part of the declaration, nor in strictness is it at all necessary, but is inserted merely in conformity with ancient precedents.

Title.] The plaintiff must set forth in his declaration a legal and sufficient title to that which he seeks to recover by the action: Vaugh. 8, 58: in real actions to the land, in personal actions to the damages, and in mixed actions to the land and damages, for which these actions, respectively, are brought. This rule is universally true, and without exception; and so strict is it, that if the title stated be defective or otherwise insufficient, it cannot be aided even by verdict, but the defendant may take advantage of it by demurrer, motion in arrest of judgment, or writ of error. 2 Doug. 688. 658. 628 n. 2 Bur. 1159. 3 Id. 1728. 3 Wils. 275. 1 T. R. 141—146. 4 T. R. 472. If, on the other hand, a good title be set forth, but be defectively stated, it is cured by verdict, although not after judgment by default, &c. See 2 Arch. Pr. C. B. 279, 4 Bing. 646.

In a writ of right, the demandant either stated that he himself was seised in fee of the lands within thirty years; or that his ancestor was seised in fee of them within sixty years, and set forth his own title by descent. In like manner, in a writ of right of advowson, the demandant counted his own or his ancestor's seisin, laying the coplees in the parson, in taking tithes, oblations, &c. F. N. B. 30. B. In *quare impedit*, the declaration must state the plaintiff's title to the advowson, such as a seisin in fee or for life, or grant of the next avoidance (stating also the seisin of the grantor,) and must also allege a presentment by himself or by the person under whom he claims; and lastly, it must allege a disturbance. See post. In ejectment, the declaration states the plaintiff's possession of the premises in question, and that the defendant entered into them with force and arms, and ejected him; which is sufficient to entitle him to damages for the trespass and ouster; in order, however,

to entitle the lessor of the plaintiff to a restoration of possession, the lessor's title must be proved at the trial.

*In actions upon contracts, the plaintiff's title to damages consisting in the contract and breach; these must be stated in the declaration. In assumpsit, the declaration must state the consideration for the promise, the promise, and the breach; for a promise without a consideration being a mere *nudum pactum*, consequently, unless the consideration be stated, it will not appear that the plaintiff has any legal cause of action. And the whole of the consideration must be stated; otherwise the plaintiff must be nonsuit. 1 T. R. 447. But it is not necessary to state the whole of the promises; if those parts, the breach of which is complained of, and also such parts as qualify or vary them, be stated, it is sufficient. 8 East, 7. In debt on bond, the consideration is never stated, but the contract and breach merely; and the same in debt or covenant on all other common law conveyances, such as leases, &c. But in debt or covenant on a conveyance operating under the statute of uses, such as a bargain and sale, &c. a valuable consideration, such as is stated in the deed, must be set forth in the declaration; otherwise it would be bad on special demurrer, see 2 H. Bl. 261, though cured by verdict or by the defendant's taking issue on a collateral fact. 2 Str. 1229. Also, in debt or covenant on a lease, by the lessor, it is not necessary that he should state his title to the lands demised, but may at once state the demise, covenant and breach; Yelv. 48. 1 Str. 230. Carth. 32. Lib. Plac. 97. Lil. Ent. 130. 141. Com. Dig. Pleader, C. 43; but in an action by the assignee of the reversion, he must state the lessor's title to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff, Clift. Ent. 213. pl. 7. 1 Saund. 231. 234, (n. 2.) Lit. Ent. 132. 135, then the demise and the covenant which has been broken, then the mesne assignments of the reversion from the time of the making of the lease until it became vested in the plaintiff, and lastly, the breach of covenant. Also, in an action on a lease by the lessor against the lessee, it is not necessary to state in the declaration the entry of the lessee, because the action is founded upon the privity of contract; 4 Leon. 18; but it is otherwise where the action is founded on the privity of estate only.

In actions upon contracts also, if the contract be conditional, it must appear upon the face of the declaration that the condition has been complied with. 9 H. 6, 15, 16. 2 Doug. 690. 6 T. R. 571. R. 7 Co. 10 a. Ughtred. As this is a subject of considerable importance in pleading, and as it will be referred to frequently in the course of the work, particularly when we come to consider the actions of assumpsit

and covenant in the third book, it may be necessary to treat of it here at some length.

In all cases where the estate or interest commences on a condition precedent, be the condition or act in the affirmative or negative, to be performed by the plaintiff or the defendant or any other, [6 T. R. 710.] the plaintiff, in his count, must aver performance. R. 7 Co. 10. Ughtred: As if a man grant an annuity to another, payable when he is promoted to such a benefice, &c. the plaintiff in annuity must aver that the defendant is promoted, &c. Pl. Com. 25 b. If a man devise that if his goods be not sufficient to pay his debts, his land shall be sold; he, who avows under the vendee, must aver *precisely that the personal estate was not sufficient. R. Jon. 328. If a man promise to surrender land, on payment of so much money; in assumpsit on the promise, the plaintiff ought to allege payment, or a tender and refusal. R. Cro. El. 889. So, if a man promise as a surety or *fidejussor* for another; in assumpsit against him for non-performance of the promise, the plaintiff must aver that he for whom the defendant was surety has not performed. R. 2 Cro. 500. If bail be bound in a recognizance that a defendant shall appear in eight days after warning, and, if he be condemned, shall render himself or pay, &c. the plaintiff should shew that he was warned, for it is a condition precedent. R. 2 Cro. 46. Com. Dig. Pleader, C. 51. So, in an action on a covenant to repair, "the lessor finding, allowing and assigning timber sufficient for such reparations," the declaration was holden bad on demurrer, because it did not aver that the lessor had found, allowed, and assigned timber for the repairs. Willes, 496. So where a man agreed to deliver to another, at a certain price fifteen tod of wool, to be chosen by the latter out of a parcel containing seventeen tod; in an action by the buyer against the seller for the non-delivery of the fifteen tod, the declaration was holden bad, because it did not aver that the plaintiff had chosen the fifteen tod, which was *quasi* a condition precedent to the defendant's delivering them. Yelv. 76. See 2 Doug. 620. *Luxton v. Robinson*.

So, if the thing demanded be granted for such a cause or consideration, this ought to be averred to have been performed; for it is in the nature of the condition precedent: as if I promise 20s. to A. for his going with me to Rome, he ought to aver his having gone to Rome, for upon that the duty commences; 7 Co. 10 b. or if promised to him for his service for a year, he ought to aver his service; Hob. 106; or in consideration of his forbearance for a week, he ought to aver forbearance. R. Cro. El. 272. Com. Dig. Pleader, C. 52. If A. promise to pay B. a sum of money, upon his giving him a general release; in an action for the money, B. must aver in his declaration that he gave or

tendered the release. 2 Bur. 899. See 2 N. R. 233. And in all other cases where two acts are to be done at the same time, as where A covenants to convey an estate on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of or an offer to perform his part, though it be not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale. 1 Saund. 320 c. 1 Salk. 112, 113. 171. 2 Salk. 623. 2 Doug. 691. 684. 4 T. R. 761. 6 T. R. 665. Therefore a declaration for not delivering wheat where it was not averred that the plaintiff was ready to pay for it on delivery, was holden bad even after verdict, and judgment was arrested. 7 T. R. 125. So, where a declaration in covenant stated that by articles of agreement plaintiff covenanted to convey a school-house and ground to the defendant, and defendant in consideration thereof, covenanted to pay him the sum of 120*l.*; and it then averred that plaintiff surrendered up the premises to the defendant, who entered and was possessed; but it did not aver that he made any conveyance of the premises to him; the court upon demurrer gave judgment for the defendant on that account, holding that the conveyance was the *consideration of the defendant's promise. 8 T. R. 366, and see 1 East. 619. Where the action is brought for the non-delivery, &c. of a thing for which money is to be paid, it is not necessary to aver a tender of the money, and a refusal; it is sufficient to aver a readiness and willingness to pay for the thing purchased, upon delivery, &c., 1 East, 203. 2 B. & P. 447. 2 N. R. 355. 7 Taunt. 314. See 1 Sid. 13. Cro. El. 888. 2 Saund. 352. (n. 3.), for he is not bound to pay for it before delivery. But where the action is brought for the price of the land or other thing sold, it must appear upon the face of the declaration that there was a delivery or conveyance, or a tender or offer to deliver or convey it, and a refusal upon the part of the defendant, or something tantamount to it; see 1 East, 619; for it is incumbent upon the plaintiff in such a case to shew, either that he has performed, or done every thing in his power to perform that which he was to do by the agreement, and which is the consideration of the defendant's contract. Comyn's Rep. 117.

Also, although a day be appointed for the performance of a promise, as for the payment of money, &c.; yet if the day is to happen after the thing, which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c. without alleging performance of that which was the consideration of it. 1 Salk. 171. 12 Mod. 462. 1 L. Raym. 665. 1 Lutw. 251. Dy. 76 a. pl. 30. As if one agree to give a hawk at such a day, and the other agree for a hawk to deliver a horse at a subsequent day; in an action for the

horse, the delivery of the hawk must be averred, for that was the consideration of the promise. Lutw. 251. 1 Salk. 171. If A. agree to build a house, and B. agree to pay 10*l.* *pro labore suo*, and there be mutual promises; in an action by A. for the money, he must aver performance of the work. R. per 2 J. Twisd. cont. 2 Saund. 351. 2 Lev. 23. So, if A. agree to assign a lease to B., and B. agree to pay *proinde* 250*l.*, and there be mutual promises; in an action by A. for the money, he must aver an assignment of the lease. R. cont. Ellis Dub. 2 Mod. 34. *but this resolution denied to be law*, 1 Salk. 172. If A. agree to pay 10*l.* to B. within six months, B. transferring so much stock to him; if B. sue for the 10*l.*, he must aver that he has transferred, or offered to do it; and if A. sue for not transferring, he ought to aver and prove payment or a tender of the 10*l.*; for they are conditions precedent, although there are mutual promises. Per Holt. 1 Salk. 112. So, if mutual agreements are to be performed reciprocally on a precedent act by the other; as if A. covenant to transfer stock to B., on payment of so much, and B. covenant to accept such transfer, and then to pay: in covenant, &c. for non-payment, A. ought to aver a transfer or a tender. R. per C. B. reversed by 3 J. in B. R., but affirmed in Parliament. 2 Mod. Ca. 68. 381. [See 1 Str. 579. 533. 777. 832. 504. 458. 615. 712. Bunb. 70. and ante, p. 85.] Com. Dig. Pleader, C. 53.

In the above cases the plaintiff in his declaration must aver performance of his part of the contract, or that which is deemed equivalent to performance, to entitle himself to his action. In the case of concurrent conditions, as for instance, the sale of goods, &c., in an action by the vendee it is sufficient we have seen to aver that the *plaintiff was ready and willing to pay for and receive them; *ante*, p. 85; but in all other cases, where the condition upon the part of the plaintiff is to do some specific act, not being the payment of money, he must shew not only that he was ready to do it, but that he has either actually done it, or at least that he has done every thing in his power towards the performance of it. Thus, if the defendant have agreed to pay for a copyhold estate, upon having a good title and a proper surrender made to him; in an action for the money it will not be sufficient to aver an offer to make a good title, but the plaintiff must shew that he furnished the defendant with an abstract of a good title, and offered to surrender, &c. but that the defendant refused. 2 H. Bl. 123. So, in an action on a contract for stock, the plaintiff must shew either an actual tender and refusal of the stock, or that which is equivalent to it, namely, an attendance at the place of transfer until the last moment at which transfers

are made, on the day appointed, and a notice given to the defendant that he might then and there attend to receive it, and a neglect or refusal upon the part of the defendant to do so. 5 East. 107. 2 Salk. 628. Com. Rep. 116. 2 Str. 777. 1 Id. 533. See Id. 458, 504. Bunb. 70. But if the plaintiff aver that he tendered to do the act, and the defendant refused it, 2 Doug. 685. 8 Taunt. 62, or that the defendant hindered the performance of the condition precedent by a neglect or default upon his part, Per Cur. 1 T. R. 645. 1 East, 619, or that the defendant discharged him from the performance of it, 2 Doug. 684, this is equivalent to an averment of performance. Where A. and B. agreed to exchange horses, and B. gave a sum of money to A. to bind the bargain; it was holden that A. might maintain an action against B. for not delivering his horse, without alleging a delivery of, or offer to deliver his own to B.; for by the payment of earnest, the property in A.'s horse was already vested in B. 5 T. R. 409.

We have now stated the cases in which a performance of a condition must be averred in the declaration, to entitle the plaintiff to maintain his action. It remains to consider in what cases a performance on the part of the plaintiff need not be averred. And first, if a day be appointed for the payment of money, or part of it, or for doing any other act, and the day must and may happen before the thing which is the consideration of the money or other act, is to be performed: an action may be brought for the money, or for not doing such other act, before performance of the consideration; for it appears the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is, where no time is fixed for performance of that which is the consideration of the money or other act. 1 Saund. 320 a. Dy. 76 a. in marg. 1 Salk. 171. 1 L. Raym. 665. 1 Lutw. 250. 12 Mod. 461. 1 Vent. 177, per Hale, C. J. 1 Salk. 113. 2 H. Bl. 389. 6 T. R. 572. Therefore, if a man covenant to pay another 500*l.* for teaching him a business, 250*l.* to be paid down, and 250*l.* on the 25th February following, an action may be maintained for the second 250*l.* after the 25th February, without averring that the plaintiff taught the defendant the trade. 6 T. R. 571. So, if a man agree to serve another in war, and the other agree to pay him so much for his *service at the day before the war began, an action lies for the money without an averment of the service. R. Lut. 250. [48 Ed. 3, 2, 3.] So, if a man, in consideration of 10*l.* to be paid after a new lease granted, promise to obtain the new lease: in *assumpsit* for not obtaining it, the plaintiff need not aver that he was ready to pay the 10*l.* R. Cro. El. 249. Com. Dig. Pleader, C. 55. But all this must be understood of cases where the parties have mutual remedies; see Com,

Dig. Pleader, C. 56 ; for where a man by deed-pool agreed to accept South Sea stock from another, and to pay him on a certain day, the court held that the plaintiff should have averred in his declaration that he assigned the stock, to entitle himself to an action for the price of it ; for the deed being a deed-poll, the remedy was not mutual, as the defendant could not sue upon it. 1 Str. 569.

Secondly, where there are mutual promises, [that is, where a mere promise on one part, is the consideration of the promise on the other part,] generally, performance need not be averred. 7 Co. 11 a, Adm. Lutw. 250. R. Mar. pl. 114. R. Lutw. 224. Cro. El. 889. R. Hard. 103, and see 2 N. R. 233. As, if a man promise to deliver a cow, and the other promise payment of 20*l.* ; in an action for the money, the delivery of the cow need not be averred. R. Hob. 88. Agr. per Holt. Lutw. 250. Danv. 72. If a man promise to deliver so many tons of iron, and the other promise payment, the plaintiff need not aver the delivery of the iron. R. Yelv. 133. If there be an agreement that A. shall pay so much on such a day, if B. will promise to maintain an infant for so many years, and there be mutual promises thereon ; in assumpsit for the money, B. need not aver that he promised, &c. R. Lutw. 223, 224. So, if A. promise to take an apprentice, and B. in consideration thereof to pay so much ; R. 1 Lev. 79 ; or to provide soldiers to be transported, and B. to provide ships to transport them : R. Sti. 186, 7. 2 Mod. 75. : [in these cases A. need not aver in his declaration a performance of the promise on his part]. So, where A., in consideration that B. undertook not to sue a bail-bond against him, and to give him the benefit of an outlawry, promised to pay B. 400*l.* ; an averment that A. had the benefit of the outlawry, without saying that B. did not sue on the bail-bond, was holden sufficient. R. 1 Lev. 20. [The above rule is fully illustrated by the case of *Martindale v. Fisher*, 1 Wils. 88. ; where the plaintiff declared that in consideration he had *agreed to deliver* cloth to the defendant, the defendant agreed to pay him so much in case A.'s horse should win a certain race ; it was holden that an averment of A.'s horse having won the race, was sufficient, without averring a delivery of the cloth ; but that if the declaration had been that in consideration the plaintiff *would deliver* cloth, the defendant agreed, &c., in that case the delivery must have been averred.] So, where there are mutual [independent] covenants, the plaintiff in covenant need not allege that he has performed the covenants on his part. R. 1 Rol. 414. l. 40, 55. [See 2 Mod. 76. Str. 615. 712.] Com. Dig. Pleader, C. 54. Where the captain of a vessel covenanted with the freighter to sail with the first convoy, and to make a right and true delivery of the cargo, "in consideration whereof and of

every thing above mentioned," the freighter covenanted to pay so *much per ton freight; in an action for the freight, it was holden to be no defence to say that the plaintiff had not sailed with the first convoy, and that the cargo was damaged by the negligence of the captain; for the covenants of the captain as to those matters, and the covenant to pay freight, were distinct and independant, and if the freighter were injured by the non-performance of the captain's covenants, he should make it the subject of a separate action. 12 East, 381. 1 Camp. 377. So, where the master of a ship covenanted with the freighter to bring a complete cargo of hemp and iron from St. Petersburg, and deliver the same in London, on being paid freight at so much per ton; it was holden that the master might maintain an action for freight *pro rata*, although he did not bring a complete cargo, the freighter having his remedy by action for any damage he may have sustained by the short delivery. 10 East, 295. Indeed in all cases, it must be observed, covenants &c. are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention: 1 Saund. 320 a. 1 T. R. 645. 6 T. R. 668. 571. 7 T. R. 130.: for no precise words are requisite in a deed, to make a stipulation a condition precedent or subsequent; nor does it depend upon its being prior or posterior in the deed; but it depends entirely on the nature of the contract, and of the acts contracted to be performed by the contracting parties. 1 T. R. 638. Therefore where the master of a vessel covenanted with the owner to pay the seamen their wages yearly, and the owner "in consideration thereof" covenanted to pay the master 42*l.* per month; the court held that the captain's payment of the seamen's wages was not a condition precedent to the payment of this monthly sum to the captain; for it never could have been the intention of the parties that a thing which was to be done yearly by one of them, should be a condition precedent to that which was to be done monthly, during the same period, by the other. 7 Mod. 236.

Thirdly, where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independant covenant, and a performance of it need not be averred in a declaration against the other party for a breach of a covenant upon his part. 1 Saund. 320 b. As where A. by deed conveyed to B. a plantation in the West Indies, together with the stock of negroes upon it, for the sum of 500*l.* and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, and was lawfully possessed of the negroes, &c.; in an action for arrears of the annuity, it was

holden no plea that A. at the time of the conveyance was not legally possessed of the negroes; 1 H. Bl. 273. n.; for that formed only a part of the consideration for the annuity. See 6 T. R. 573. 1 H. Bl. 279. 1 Saund. 320 c. So, where, in consideration of 500*l.*, of which 250*l.* was to be paid down, and 250*l.* at a future day named, the plaintiff covenanted to allow the defendant to make a certain article for which he had obtained a patent, and to teach him to make it; in an action for the second 250*l.* it was holden to be no plea that the plaintiff had not taught the defendant to make the article in *question, that being only part of the consideration. 6 T. R. 571. So, a covenant in a charter-party, that the owner shall at his expense forthwith make the ship tight and strong for a voyage for twelve months, &c. and keep her so, is not a condition precedent to the recovery of freight earned after the freighter had taken the ship into his service; but if the freighter be delayed or injured by the necessity of repairing her afterwards, he has his remedy upon the covenant. If however the owner's neglect to repair in the first instance, had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might be insisted on as a bar to the action. 10 East, 555. To bring a case, therefore, within the rule above mentioned, the consideration must have been in part executed, and not be entirely executory. 1 Saund. 320 c.

And lastly, when any estate or interest passes or vests immediately, and is to be defeated by a condition subsequent or matter *ex post facto*, be it in the affirmative or negative, to be performed by the plaintiff or the defendant or any other; performance of such condition subsequent need not be averred: as if a man grant an annuity for the maintenance of six soldiers for the defence of a castle, the plaintiff in annuity need not aver that he has maintained, &c. R. 7 Co. 10 a. So if an annuity be granted to A. until he be advanced to a benefice, A. in annuity need not say that he is not yet advanced. 7 Co. 10 ab. Pl. Com. 25 b. 30 a. 32 b. Com Dig. Pleader, C. 57. So in an action against a man upon his covenant to deliver 1500 measures of saltpetre before such a day, "provided that if any misfortune happen by fire or water to disable him, he shall be excused," it is not necessary to state the proviso in the declaration, nor to aver that no misfortune, &c. happened. 1 Lev. 88. See 1 T. R. 638. S. P.

Besides the case of a condition precedent, &c. now treated of, there are other instances in which averments are necessary in a declaration; as for instance, where a man contracts to do a thing upon request, the request is *quasi* a condition precedent to his performing his contract, and consequently must be averred in the declaration. In some cases this averment must be special, stating the time and place, &c. at which

the request was made ; in others, the common averment *licet scipius requisitus* is sufficient, and no actual request need be made or proved, but the bringing of the action is deemed a sufficient request of itself. This shall be fully treated of in the next part of this section.

So, the declaration must contain an averment of notice having been given to the defendant of a certain act done, in all cases where the action does not lie before such notice has been given. Thus, if the act on which the plaintiff's demand arises be secret, and lie only within the plaintiff's knowledge : as if a man promise to pay such a rate for wares as any other paid him, the plaintiff should allege notice of the rate that another gave ; R. 2 Cro. 432. R. 1 Rol. 463. l. 25. Hob. 51. Hardr. 42 ; or to deliver so much corn at the fair, if the plaintiff approve of it, the plaintiff must aver a notice that he approved of it ; R. Cro. El. 249, 250. ; and the same, upon a promise to repay so much to B., if he disliked such *lands ; R. Cont. Cro. El. 834. 1 Rol. 464 ; or to seal such an escrow, as he or his counsel shall devise. R. 1 Rol. 463. l. 5, 50. ; or to account before auditors whom the obligee shall assign : R. 1 Rol. 462. l. 50. ; or to pay plaintiff all his costs in such a suit, Hardr. 42, or the damages he sustained by such a battery. Id. Contr. Dig. Pleader, C. 73.

But if a man be bound, covenant, or assume, to pay money, convey lands, &c. on the performance of an act by a stranger, no averment of notice is requisite ; for it lies in the defendant's knowledge as well as the plaintiff's and he ought to take notice of it at his peril : [1 Saund. 117. (n. 2.) Cro. El. 97. 1 Sid. 442. 1 Vent. 98. 8 Co. 92 b. 1 Bulst. 44. per Yelv. Cro. Car. 132, 133. Hob. 14. Freem. 254. 3 T. R. 374 :] as, if he promise to pay so much when A. marries ; R. 1 Rol. 462. l. 10 ; or when A. returns to the kingdom, R. 2 Cro. 462, 463. R. 1 Rol. 463. l. 6., or performs such a journey ; 1 Rol. 463. l. 13. R. 2 Cro. 137. 150 ; or if he promise, &c. to pay so much as A. shall name ; R. 2 Bulst. 144. R. Cro. Car. 133. 1 Rol. 464. l. 5 ; or to pay if A. do not pay ; R. 2 Cro. 684. R. 1 Rol. 462. l. 25. 463. l. 45 ; or to pay so much for every acre above 20, when A. measures them ; R. 1 Rol. 462. l. 35 ; or to make such assurance as A. shall advise, D. 1 Leon. 105, or as his counsel shall advise ; per Gawdy. 1 Rol. 464. l. 2 ; or to discharge upon all escapes ; R. Hob. 14 ; or to pay the arrears found on account ; 8 Co. 92 b. ; or to be accountable for all money paid to A. by B. ; R. 1 Lev. 47 ; or to stand to the award of such a one ; Hardr. 42. [1 H. 7, 5. Bro. Condition, 124, Notice 18. 8 Co. 92. b. ; although notice of the award is now usually averred ; 2 Saund. 62 a. (n. 4.) and if the submission provide that the award shall be notified to the parties, such an averment must be made, for it is no award until no-

tice given. 2 Bulst. 144. 2 Saund. 62 a. (n. 4.)] So, if he promise, &c. to pay, &c. on the performance of a certain act by the obligee himself, or on the performance of an act by him to any certain person, the performance need not be averred; for the defendant takes upon himself to take notice of it at his peril: as if a man promise, &c. to pay on the marriage of the obligee with B.; R. 2 Cro. 102. R. 2 Cro. 328. Yelv. 168. R. 2 Cro. 405. 1 Rol. 461. l. 50. R. Cro. Car. 34. Hut. 80. Per C. J. 1 Sid. 36. 1 Rol. 463. l. 20. R. 2 Bulst. 254. R. 3 Bulst. 326. R. Poph. 164; or to pay, when the obligee delivers a horse to B., per Yelv. 1 Rol. 461. l. 45, or returns to London, per Dod. 2 Bulst. 145. R. 1 Rol. 462. l. 15. Cont. per Warb. Hob. 68. R. cont. 1 Bulst. 44, or returns from Rome, Dub. Owen, 108. R. Hut. 80, or delivers up a bond; R. 2 Salk. 457; or if the defendant undertake to indemnify, in case the plaintiff be surety for his father to A. D.; 1 Leon. 105. R. 2 Cro. 287; or to pay, if he borrow of any certain person; per 3 J. 1 Bulst. 12; or to pay for every acre when it shall be measured; R. 2 Cro. 473. 391. 1 Rol. 462. l. 45; or to pay a rate for what the plaintiff shall sell to B.; R. 2 Cro. 432. R. 1 Rol. 463. l. 36; or to pay when B. attains his full age; Hardr. 42; or to give him as much as will make him content; R. 1 Leon. 123; or to surrender to B. or his assignees; R. Poph. 136. 1 Rol. 464. l. 10; or to pay all money delivered by A. to B.; R. Hardr. 42; in these several cases an averment of notice is unnecessary. So, if he *promise, in consideration of such a certain act, it is sufficient to aver performance of the act, without averring notice of the performance to the defendant: as, if it be in consideration she discharged him of a promise of marriage, it is sufficient to say *quod exoneravit ipsum*, without alleging that he had notice; for it shall be intended that there was a full disengagement made to the defendant himself in person; R. 1 Rol. 470. l. 5; so, in consideration that she came to his house and offered to marry him, it is sufficient to say *quod venit et obtulit* to marry, for it shall be intended that the offer was to the defendant himself in person. R. 1 Rol. 470. l. 20. [So, in debt on a charter-party for freight, if the goods be stated to have been delivered to the defendant himself, it is not necessary to aver notice of the delivery. Hardw. 342.] So, in debt for a penalty at a leet, for not removing an encroachment, it is not necessary to aver notice of the order of removal, for every one within the leet ought to take notice of it; R. 1 Rol. 468. l. 20; so, in debt for the penalty of a bye-law, concerning a common, it is not necessary to aver notice of the bye-law, for every commoner ought to take notice of it. R. Cro. Car. 498. Com. Dig. Pleader, C. 75.

We shall now proceed to consider the statement of the plaintiff's

title to damages, in actions *ex delicto*. In trespass for injuries to real property, it is not necessary to state a title to the property trespassed on, possession being a sufficient title to enable the plaintiff to maintain the action; 2 Bulst. 286; but the declaration merely states it to be the close or dwelling house, &c. of the plaintiff. So, in case for a nuisance, it is sufficient for the plaintiff to declare upon his possession, without setting forth his title. 1 Lutw. 120, and see 2 Mod. 71. And indeed in all cases, where a plaintiff in possession brings an action on the case against a wrong-doer, it is sufficient to declare generally, without stating the precise estate of which the plaintiff is seized, or laying any title by grant or prescription to the thing, which he is disturbed in or hindered from enjoying. 4 T. R. 718. 2 Saund. 118 b. Thus, in an action by a commoner for a disturbance of his common, it is not necessary for him to state any title to the common by prescription or otherwise, but merely to state that he is possessed of certain land, &c. and by reason thereof has a right of common in such a place for his commonable cattle, levant and couchant upon his land, and then to state the disturbance; 2 L. Raym. 1230. 3 Wils. 280, 458. 4 Mod. 418. Com. Rep. 7. Skin. 621. 213. 1 Vent. 319. 4 Mod. 175. 1 Ld. Raym. 266, and see 1 Str. 6; although formerly it was the practice to set forth the title. Co. Ent. 9. pl. 8. 11, pl. 2. Winch. Ent. 76. Herne, 64. 207. 1 Lutw. 101. Lib. Plac. 40, pl. 58. Lil. Ent. 62. 1 Saund. 346, (n. 2.) So, in an action on the case for stopping a watercourse, it is sufficient to state that plaintiff is possessed of the mill, and had a watercourse running in the defendant's land to the mill, and that the defendant stopped the watercourse; without stating it to be an ancient watercourse, or otherwise prescribing to have a watercourse in the defendant's land. Cro. Car. 575. 500. R. 3 Lev. 133. 3 Mod. 49. 1 Show. 64. Carth. 84. Skin. 65. 175. 316. So, in an action for a disturbance of way, it is sufficient to declare generally upon the plaintiff's possession of certain land, messuage, &c., by reason *whereof he had and ought to have a way through and over the place in question, and that the defendant stopped it up and obstructed the plaintiff in the use of it. 1 Lutw. 119. 2 Vent. 185, 186. 180. 275. 3 Lev. 286. 2 Lev. 146. T. Jon. 157. Noy, 86. So, in an action for disturbing the plaintiff in the enjoyment of a pew in a church, it is sufficient to state his possession of a messuage, and that the pew is appurtenant thereto, and then state the disturbance, without stating any further title. R. 3 Lev. 73. 1 Wils. 226, see 1 T. R. 428. So, if a man have a prescriptive right of sepulture in a church, he need not, in a declaration for a disturbance, at least by a stranger, set forth the whole of it. 1 Burr. 440. So, in an action by the owner of an ancient ferry, against a person who erected

a new ferry near to his, it was holden sufficient for the plaintiff to declare on his possession, and that he need not state in his declaration that he kept boats and ferrymen sufficient to carry passengers over. *Willes*, 508. So, in an action by the owner of a fair or market, against a person who erects another fair or market in the vicinity, or who disturbs him in taking toll, &c. it is not necessary to state a title in the declaration by grant or prescription; stating that the plaintiff was possessed of the close, &c. and of the market or fair thereon holden. *Cro. Jac.* 43, 123. 2 *Vent.* 292. 2 *Lutw.* 1517. 3 *Lev.* 190. 2 *Saund.* 172. (n. 1.) or that J. S. demised to him the tolls and profits of the fair or market, without setting out J. S.'s title, *Owen* 100, and then stating the disturbance is sufficient. And the same, in all other cases of disturbance of franchise: as in an action against a sheriff for executing a writ within a liberty or franchise, it is sufficient to state generally that the franchise and liberty of executing all writs, &c. out of the king's courts, within the limits in question, belong to the plaintiff, and then state the disturbance. 1 *Show.* 17. So in an action for not grinding at the plaintiff's mill, it is sufficient for the plaintiff to declare on his possession of the mill, and that he is entitled to the toll of the corn there ground, that the defendant dwells in such a house, and ought to grind all his corn and grain, spent ground in his house, at the plaintiff's mill, and then assign a breach for not grinding, &c.; without setting forth any title by custom or prescription. *Willes*, 654. 2 *Vent.* 286—292. 2 *Saund.* 113 a. (n. 1.) A distinction was formerly taken between an action against a mere wrong-doer, and an action against a person in whose soil the plaintiff claims an easement; that although in the former it was not necessary to state a title, in the latter it was. But this distinction no longer prevails; and the general mode of declaring above mentioned, has been allowed for more than a century past, in both cases alike. *Com. Rep.* 44. per *Buller, J.* 2 *Saund.* 114 a. 3 *Lev.* 266. 2 *Vent.* 180. 1 *Lutw.* 119, but see 1 *Wils.* 326. However in all these cases, although the plaintiff is allowed to declare thus generally, he must prove a good and sufficient title by grant or prescription, &c. at the trial, otherwise he must be nonsuit. *Bul. N. P.* 76. 1 *Saund.* 346. (n. 2.) 1 *Doug.* 223. 4 *Mod.* 418. *Com. Rep.* 7 *Skin.* 621. Also, if the plaintiff, instead of declaring thus generally upon his possession, undertake to set out a title, and do it insufficiently, the declaration will be bad. 1 *Salk.* 363. 2 *L. Raym.* 1230. 1 *Saund.* 346. (n. 2.) but see 2 *Bulst.* 288.

*Also, where a man is chargeable with a duty, by reason of his estate or tenure, it is not necessary, in an action against him for non-performance of the duty, to state the particulars of the estate, &c. by means

of which he is chargeable. Thus, in action on the case, for not repairing a private road leading through the defendant's close, 3 T. R. 766. Com. Rep. 44, or for not repairing fences between the plaintiff's and defendant's closes, 1 Vent. 264. Cro. Jac. 665. 2 L. Raym. 804, per Holt. See 1 Salk, 335, 6. cont., it is sufficient for the plaintiff to allege that the defendant, as occupier of the close, is bound to repair. So, in an action for not repairing a wall between the defendant's privy and the plaintiff's cellar, "*reparare debuit*" generally, was deemed sufficient. 1 Salk. 360. 2 Ld. Raym. 1029. 6 Mod. 311. If the defendant be chargeable with a duty by custom, if it be the custom of the whole realm, as in the case of common carriers or innkeepers, it need not be stated in the declaration; but merely stating the defendant to be a common carrier or inn-keeper, and then assigning the breach of duty complained of, is sufficient. But if the action be brought on the custom of a particular parish or place, the custom should be stated in the declaration in such a manner as to shew the duty thereby chargeable upon the defendant: as in an action on the case for not keeping a common bull or boar within the parish, the declaration should shew the custom, R. 4 Mod. 241, or, at least, that the defendant, being rector of the parish, ought to keep, &c. Id.

In trover, the declaration states that the plaintiff was possessed of the goods, &c. in question, that he casually lost them, that the defendant found them, and converted them to his own use. The conversion is the gist of the action, the remainder being a mere fiction.

In an action founded upon a statute the plaintiff must state in his declaration every fact necessary to inform the court that his case is within the statute: as, in *quare impedit* by the king, on the stat. 13 El. c. 12, for not reading the thirty-nine articles, it should be averred that the benefice in question is a benefice with cure; R. 1 And. 62. Lutw. 1089; and the same, in *quare impedit* by the king, founded on stat. 31 El. c. 6, for simony. Semb. Lutw. 1089. So in *quare impedit* by the University, on the stat. 3 J. 1. c. 5, for the benefice of a recusant, the plaintiff must aver that the patron is a recusant convict. R. 10 Co. 58 a. So in an action on stat. 7 Ed. 6, c. 7., against buying wood, coal &c., in London, Westminster, or suburbs, and selling again, unless by retail, if the plaintiff allege that the defendant bought at Whitechapel, or the like, he should aver that Whitechapel is within the suburbs. Lit. 162. If a man entitle himself by a lease, which, by a proviso in a statute, will be good if the ancient rent be reserved, he must shew that a rent was reserved, and aver it to be the ancient rent. R. Pl. Com. 105 b. If in an action on stat. 14 H. 8, c. 5, for practising physic within seven miles of London without a licence, the plaintiff allege a practice at Westmin-

eter, and do not say that it is within seven miles of London, it is bad. R. 4 Mod. 47. So, the statement or averment should be agreeable to the statute: as if the stat. 28 El. be pleaded, which enacts that a recusant shall be convict if he render not himself **before* the next sessions; if it be pleaded that he did not render himself *at* the next sessions, it will be bad. 3 Lev. 333. So, in all cases where any circumstances are required by the purview of an act to make it good, they ought to be averred; as, where the stat. 1 R. 3, c. 1. makes a feoffment, &c. by *cestui que use* of full age, sane, and at large, &c. good; in pleading a feoffment by *cestui que use* [before the statute of uses] it should be averred that he was sane, of full age and at large. Pl. Com. 376 b. [4 H. 7, 8; Doct. Pl. 248.] Com. Dig. Pleader, C. 76. So, if a devise of lands be pleaded, it must be shewn that it is in writing, as required by 32 H. 8, c. 1, and that the requisites to its validity, under the statute of frauds, have been complied with; for devises of land were not allowed at common law, but the power of making them was first given by stat. 32 H. 8; 12 Mod. 540. But where a statute makes certain circumstances necessary to the validity of an act, which was already valid at common law without such circumstances, these circumstances need not be mentioned in pleading: thus by stat. 29 C. 2, c. 3, an assignment of a term must be in writing, yet it is not necessary, in pleading it, to allege that it was in writing, although that must appear in evidence. 12 Mod. 540. In an action on the statutes of hue and cry, the plaintiff must allege that the goods, &c., of which he was robbed, belonged to him; or in the case of a carrier, he should set forth the custom by which he is chargeable. 2 Saund. 379. In an action against a person who farms the post-horse duties, under stat. 27 G. 3, c. 26, for neglect of duty, the plaintiff must aver specifically that the defendant is the person appointed, under and by virtue of the statute, upon whom the duty is thrown; it is not sufficient to state he is a collector of the rates and duties recited in a certain act, &c. 6 T. R. 163. But in an action on stat. 2 & 3 Ed. 6, c. 13, for not setting out tithes, it is not necessary to set forth any title to the tithe; because the action being in the nature of a trespass, it is sufficient to shew a possession of the tithe in the plaintiff; 2 Lev. 1. Cro. Jac. 68. 361. 437. 1 Vent. 126. 2 Bulst. 67; and also because it is not required by the words of the statute.

Having considered what is necessary to be stated in a declaration, to shew that the plaintiff has a title to that which he seeks to recover by his action, we shall now notice some matters of which the court will *ex officio* take notice, and which therefore need not be alleged in pleading. And first, public statutes are never recited in pleading, 4 Co. 76.. Bro. Parl. 69. 2 Ro. Abr. 465. Cro. El. 601. Doct. Pl. 337, Bac. Abr. Statutes, L. 1, unless when they give a new form of action,

2 Inst. 121. Bro. Act. sur. stat. 47, Parl. 75, and do not ascertain the form of the writ. Bro. Ibid. Therefore even where a statute gives an old form of action in a new case, as for instance trespass by an executor *de bonis asportatis in vita testatoris*, it is not necessary to recite the statute. Id. Bac. Abr. Stat. L. 4; see Com. Dig. Act upon stat. G. H. But a private statute must be recited in pleading; for the court cannot take notice of it *ex officio*. 4 Co. 76. 2 Ro. Abr. 466. 2 Mod. 57. Yet if part of a statute be public, and part private, it is not necessary that *the part which is public should be recited. 10 Co. 57. Hob. 227. 1 Sid. 24. As to what statutes are public, what private, see Bac. Abr. stat. F. Com. Dig. Parl. R. 6, 7. Doct. Pl. 336—340. 15 East, 322, and post.

Secondly, the rules of the common law, and general customs (such as the custom of the realm relating to carriers, common innkeepers, &c. and the customs of gavel-kind, borough English, Co. Lit. 175, and the like,) need not be stated in pleading; for the court *ex officio* will take notice of them. 22 H. 6, 21, 22. Doct. Pl. 102. But particular customs, or those which affect the inhabitants of particular districts only, (such as the customs of London, 2 Str. 1187. 1 Wils. 8, and the like,) must be stated. Dy. 27 b. 121 b. Doct. Pl. 105. The practice of the courts may also be pleaded, where the merits of the case depend on it. See 16 East, 39. 15 East, 378. The courts, however, will judicially take notice of their own practice; 9 East, 42; as also of the beginning and end of the terms, 3 T. R. 182. 1 Saund. 300 b. (n. 7.) 2 L. Raym. 1557. 1 Id. 4. 354. 1 Vent. 264; and other matters of a similar nature. The court will also take judicial notice of the different counties, but not of particular parts of counties or their local situation. 4 B. & A. 243.

Scire facias on a recognizance of bail; plea, no *ca. sa.* duly issued, lodged and returned; replication, *ca. sa.* issued and returned *non est inventus*; rejoinder, that it did not lie four days exclusive in the sheriff's office: held, on demurrer, that the rejoinder was bad; for if it were not a departure, it was bad, as pleading a mere matter of practice, which cannot be done. *Sandon v. Proctor*, 7 B. & C. 800.

Thirdly, matter implied by law need not be stated in pleading: thus, in pleading a feoffment, it is not necessary to allege a livery of seisin, for it is implied by law. 10 Ed. 3, 45. Doct. Pl. 48, 49. Co. Lit. 303 b. Cro. El. 401, and see 2 Saund. 305 a (n. 13.)

Fourthly, matter apparent to the court need not be stated; as if a man shew that his tenant aliened in fee to a dean and chapter, and that he as lord entered within a year, he need not aver that such alienation is mortmain. Pl. Com. 81 a. So in an action on stat. 32 H. 8. c. 9. of

maintenance. it need not be averred that the thing bought was a pretended title, &c. Semb. Pl. Com. 81. Com. Dig. Pleader, C. 78. [So, in an action for falsely and maliciously suing out a commission of bankrupt against the plaintiff, it is not necessary to aver that he did not commit an act of bankruptcy, that being implied by the words "falsely and maliciously." 2 Wils. 145.] And if a man aver contrary to that which appears to the court, it is of no avail, but shall be rejected: as if a man aver that land is appurtenant to a messuage, which cannot be in law; R. Pl. Com. 170 b; or if, to debt on bond for 200*l.* conditioned for the payment of 104*l.* the defendant plead "that the plaintiff released the said obligation by the name of an obligation for 200*l.* for the payment of 100*l.*, and that no other obligation was given," it is not good; for a bond for the payment of 100*l.* cannot be a bond for the payment of 104*l.*, and the averment that he released the said obligation shall not avail. R. Al. 71. So, if the king by patent grant lands in A. and B., and to an information for intrusion into the lands in C. and D. this grant be pleaded, with an averment that they are the same lands, it is bad; for it is impossible that land in one vill should be the same with land in another vill. R. Sav. 38. Com. Dig. Pleader, C. 79.

And lastly, matter which goes to defeat the action, need not be stated; for this will come more properly from the other side: as in debt on stat. 23 H. 6, c. 14, against bailiffs for not returning the *plaintiff a burgess, it is not necessary to aver that there is no mayor; though the statute says that the sheriff shall send his precept to the mayor, and if there be no mayor, to the bailiffs; for if there be a mayor, it shall be shewn by the defendant. R. Hob. 78. So, in trespass *quare canem*, viz. a bloodhound *cepit*, it need not be averred that the plaintiff can expend 40*s.* per annum. 12 H. 6, 3. So, if a breach of covenant be assigned in pulling down a house, it need not be averred that this was not a house allowed to be pulled down. R. 1 Leon. 18. If the defendant in trespass justify entry, by process on a *homine replegiando*, to do execution, he need not say that the man to be replevied was not taken by the command of the Chief Justice, &c. Semb. Lutw. 1433, 4. In false imprisonment it is sufficient to say that he took him by force of a *capias* without saying how it was returned. Pl. Com. 16 b. If a man plead a fine, it is not necessary to shew that the person barred by non-claim was sane, of full age, &c., for this shall come from the other side, not being in the purview of the statute, but as an exception. Pl. Com. 376 a. So, if he say, such a one, being seised, made his will, he need not say that he was of full age, &c.; Pl. Com. 376; or if he plead that tenant in tail demised, he need not say that he was of full age, though this is requisite to his making a lease, by stat. 32 H. 8, c. 28. 1 Leon.

76. Com. Dig. Pleader, C. 81. So, if a plaintiff allege a condition subsequent to his estate, he need not aver performance of it, for the allegation was *ex abundanti*. Pl. Com. 30 a. Com. Dig. Pleader, C. 80: So a description, not material, need not be averred: as if a man make title by prescription to a portion of tithes, and that the tithes came to the king, who granted them by the name of all tithes, part of the demesnes of the archbishop, &c. and in the tenure of B.: it need not be averred that they were part of the demesnes, or in the tenure of B., for the tithes are otherwise described and ascertained, and whether it be true or false, the grant will be good. R. Dy. 87 b. Com. Dig. Pleader, C. 83.

If a good title to that which is sought to be recovered by the action be not stated in the declaration, the defendant may demur, move in arrest of judgment, or bring a writ of error. See post, sect. 5.

Duplicity.] Each count in a declaration must contain but one title to whatever is sought to be recovered; otherwise it will be bad for duplicity. Hob. 295. Thus, in *quare impedit*, if the plaintiff allege several presentations in his ancestors, or a presentation by a feoffor and another by the feoffee, the declaration is bad for duplicity. Com. Dig. Pleader, C. 33. So where the plaintiff, in a declaration in case, stated that he lent a gelding to the defendant to ride from L. to E., and that the defendant, intending to deceive him, rode it from L. to E., and from E. to L. again, and abused the horse so that he became of little value, and afterwards refused to deliver him to the plaintiff, and converted him to his own use: the court held the declaration to be bad for duplicity, as containing several causes of action, part founded upon the contract, part upon the tort. Cro. Car. 20. So in debt on bond for the payment of money by instalments on several days, the plaintiff assigned as breach that the *defendant did not pay on the said several days, &c.; and the court held that the declaration was bad for the duplicity, as a non-payment upon any of the days would be a forfeiture of the bond 2 Vent. 198, 222. 1 Saund. 338. 1 Rot. Rep 112. Comb. 297. But in an action on a covenant to pay rent yearly by equal portions at Michaelmas and Lady Day, where the breach assigned was that the defendant did not pay the rent due at the aforesaid several feasts during the term, the court held this to be sufficient, and distinguished it from the last case by saying that there the assignment of non-payment at any of the days was sufficient to entitle the plaintiff to the penalty of the bond. 1 Lev. 79. So, in covenant the plaintiff may assign as many breaches as he pleases, without subjecting his declaration to any objection for duplicity. 11 E. 4, 10. 5 H. 7, 7. Doct. Pl. 144. So where the premises let to the defendant consisted of two tenements, one of which

the lessor held in fee, the other for a term of years, and the lessor assigned his interest in each to the plaintiff, by two separate deeds; a declaration in covenant, by the plaintiff as assignee, stating the different assignments of the several tenements, being objected to for duplicity, the court held clearly that it was not double, and gave judgment for the plaintiff. Cro. Jac. 329. So, if there be three in execution jointly at the suit of A., and all escape, A. may declare for the escape of all, and his declaration will not be double, although the escape of any one of them would be sufficient to entitle him to his action. Keilw. 68. Styl. 62.

It seems that duplicity may be the subject of a plea in abatement; see Com. Dig. Abatement, G. 4; but the usual mode of taking advantage of it is by special demurrer, shewing specifically in what the duplicity consists. 1 Wils. 219. Com. Rep. 115. 1 Salk. 219. 1 Lut. 4. It is cured by general demurrer. 1 Saund. 386. 2 Vent. 198, 222, or by the defendant's pleading over. 2 Vent. 222.

Surplusage.] Surplusage shall not vitiate a declaration: [Doct. Pl. 289.]: and therefore if in a declaration a man make an imperfect mention of a thing, which need not be mentioned, it is not prejudicial; as in a *warrantia chartæ*, if the plaintiff say that he requested the defendant to warrant the land to him or give him a plea in *bar*, although the vouchee might plead in abatement as well as *bar*, yet it is sufficient; for the request to warrant was sufficient, and the request to give a plea was surplusage and need not have been mentioned. Hob. 28. So, if he mention a condition subsequent, and do not allege a certain performance, it shall not hurt; for the whole was surplusage. Pl. Com. 30 a. 32 b. So, if a trespass temp. Eliz. be alleged to be *contra pacem nuper Regine et Regis nunc*, it is not bad, for "*Regis nunc*" may be rejected as surplusage. R. 2 Cro. 377. 3 Bulst. 82. [Carth. 95, although perhaps it would be otherwise if assigned for cause in a special demurrer. See 1 Show. 28. So, when an action is given by statute to the informer only, and the declaration states the action to have accrued to the king, the poor of the parish, and the informer, this has been deemed surplusage, and the declaration holden good notwithstanding. Andr. 67.] So, if the plaintiff declare *quod cum ipsi idem def, &c.*, for *ipsi* is surplusage. 2 Mod. Ca. 377. So words may be rejected as surplusage, though not repugnant to the preceding words, if by their omission that which was insensible may be made sensible. Dub. 1 Salk. 325. [1 T. R. 235.] So, if by the words after a *viz.* or *scilicet*, a thing be alleged, impossible or repugnant to the plaintiff's title, the words shall be rejected as surplusage: as in ejectment, if the entry or ouster be alleged *postea, viz.* such a day, being a day before the demise. See 1.

Salk. 325. So, in trespass. So in debt for rent, if a devise of a reversion to the plaintiff be alleged, and that *postea*, viz. such a day the devisor died, being a day before the making of the lease. R. Hardr. 4, Com. Dig. Pleader, C. 28. *See the next part of this section.* So, in a declaration in covenant, where it was stated that before the exhibiting of the bill, viz. on the 1st. Nov. 1797, 900*l.* of the rent reserved, for two years and three months, was due and in arrear, it was holden that as this referred to a time before the lease was made, and was therefore impossible in respect of the subject-matter, the date here mentioned might be rejected as surplusage. 10 East, 139. So, where the defendant agreed to pay the plaintiff 1500*l.* in two months, in consideration of which the plaintiff promised to give him a release of certain claims; in an action for the money, the plaintiff having averred that he was ready and willing to give a release, and an objection being made on account of a variance between the release mentioned in the averment and that in the agreement, the court held the variance to be immaterial; for the plaintiff need not have made the averment at all, and therefore it might be rejected as surplusage. 2 New Rep. 233. So in all cases where a matter is stated, which by law need not be proved, in order to maintain the action, it may be rejected as surplusage; and a variance between the proof and statement of such matter is holden to be immaterial. *Droper v. Garratt*, 2 B. & C. 2.

But if a man, by the allegation of a thing not necessary, shew that he has no cause of action, this though surplusage, will vitiate; as in assise; if the plaintiff make title, which he need not, and the title be not good, the whole shall abate. Pl. Com. 84 b. 202 b. So in an action against a disturber, where possession is a sufficient title for the plaintiff, yet if the plaintiff, instead of declaring generally upon his possession, shew a title, and that title appear insufficient, the declaration is bad. 1 Salk. 363, 365. [2 Ld. Raym. 1230. ante, p. 93. 1 Saund. 346. (n. 2.) So, in an action against the sheriff, for taking goods without levying a year's rent, the plaintiff having set forth the particulars of the demise (which was unnecessary,) and not proving them as laid, was nonsuited. 1 T. R. 236. n.] So in partition, if the plaintiff shew that he and the defendant both hold in fee, whereas the defendant is seised in tail, this shall abate the writ, although it was not necessary to shew the defendants title. R. Cro. El. 760. Com. Dig. Pleader, C. 29. Where a replication stated that the plaintiff, before a *distringas* had issued against him, appeared to a writ sued out against him in the same action, to wit, a *clausum fregit* issued out of C. B.; the court held that these words after the *scilicet*, being material, *could not be rejected as surplusage, and consequently that a re-

cord of an appearance to *clausum fregit* issued out of Chancery, would not support the replication. 2 New Rep. 468. And, lastly, it is a general rule, that an allegation in pleading, which, is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*; 5 East, 244; unless indeed it were unnecessary to state or prove it, in order to maintain the action. 2 B. & C. 2.

2. The Manner of Stating the Cause of Action.

The essential qualities of a statement of the cause of action is a declaration are, that it be certain, positive, and true. Co. Lit. 303 a. Pl. Com. 84, 122. Com. Dig. Pleader, C. 17.

It must be certain as to the Parties.] Care must be taken that the parties' names be stated correctly, for the reasons already mentioned: ante, p. 80. If a declaration by A. B. shew a title *cuidam* A. B., it shall not be intended to be the plaintiff. R. 2 Lev. 207. If it charge *quod prædict.* A. B. *deposuit*, &c. where two of the same name are before-mentioned, it shall not be intended to be the defendant. R. Cro. El. 267. But where there is mention of a manor or name before expressed, it shall be intended the same, though *prædictus* be omitted. R. 2 Cro. 192. Com. Dig. Pleader, C. 18.

Formerly a mistake in the Christian or surname of either party, was, and still is, cured by verdict, by 16 & 17 C. 2, c. 8, and after judgment by confession or default, by 4 A. c. 16, s. 2. See 2 Arch. Pr. C. B. 279. It might be cured also by the defendant's pleading over. But the defendant might have objected to the misnomer by plea in abatement. Now, however, by 3 & 4 W. 4, c. 42, s. 11, no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit. But where the action is upon a written instrument, the slightest variance as to the names of the parties, in setting it forth in the declaration, and in the instrument itself when produced at the trial, will be fatal. As if a bill drawn by John Crouch, be declared upon as drawn by John Couch, the plaintiff must be nonsuit. 3 B. & P. 559. And in an action against three on their joint promissory note, two of whom

were stated to be outlawed, it was holden that the third might take advantage of the misnomer of his companions, upon the general issue, on the ground of a variance between the contract declared upon and that proved. 4 T. R. 611. But in actions on bills of exchange, promissory notes, or other written instruments, any of the parties to which are designated by the initial letter, or a contraction of his Christian or first name or names, it is *sufficient in the affidavit to hold to bail, process and declaration, to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full. 3 & 4 W. 4, c. 42, s. 12. See also stat. 9 G. 4, c. 15, and 3 & 4 W. 4, c. 42, s. 23, post, p. 112.

A count for goods sold and delivered, stating that the defendant on a certain day was indebted to the plaintiff in a certain sum, for goods sold and delivered by the plaintiff to the defendant, but not stating any time at which the goods were sold or delivered: held, good on special demurrer. *Lane v. Thelwell*, 1 Tyr. & Gr. 352

It must be certain as to the Time.] So, the time of a matter charged in a declaration, ought to be alleged with certainty; and therefore in assumpsit, if the plaintiff omit the day when the promise was made, it is bad. Yelv. 94. So in trover, if he omit the time of the conversion. Cro. El. 97. In rescous of a distress for rent, the days of payment of the rent should be alleged. Kit. 227 a. In trespass for retaining his servant, the plaintiff ought to shew the time of his retainer. Pl. Com. 24 a. If he declare on a lease for years made to him, he ought to shew the day when the lease was made. Pl. Com. 24 a. [If he plead a lease and release, he must shew the day when both were made, for otherwise it would not appear but that the release was made before the lease. 32 H. 6, 8. Doct. Pl. 30.] In debt on bond conditioned to perform covenants in certain indentures bearing even date therewith, the court held that the plaintiff should have alleged a date of the bond, and averred that the indentures bore even date therewith, although in fact neither bond nor indentures were dated. Noy, 21. If a deed have no date, it should be pleaded of the day it was delivered; or if dated, it may be pleaded as having been made either on the day it bears date, or on the day it was delivered, at the option of the party pleading it. See Com. Dig. Fait, B. 3, and the authorities there cited. In assumpsit against an executor, upon a promise of his testator to leave the plaintiff's wife as good a portion as he should give to any of his children, the plaintiff averred that the testator gave such a portion to such a daughter; the court held the declaration to be bad, because it stated no time when such portion was given, and probably

it was before the promise was made. Latch. 203.] In the same manner, the time of every fact material to maintain the declaration must be alleged, [whether the day laid be material and traversable or not. It is sufficient however if the day be laid after a *widelicet*, even in cases where it is material and traversable. 1 Saund. 169. 1 Lev. 245. 1 Sid. 370. 3 Bur. 1729. 2 Wils. 335. 1 W. Bl. 494, 495. 5 T. R. 71. 356. 1 T. R. 656. 6 T. R. 460. 1 Saund. 170. (n. 2.) And if the day so laid after a *viz.* be insensible or repugnant to what has preceded, if not traversable it may be rejected as surplusage; 10 East, 139. (2 Saund. 291. n. 1.); but if material and traversable, it cannot. Per Jones, Latch. 200, 201.] If however, by rejecting the day laid thus after a *viz.*, no time be laid to a material fact, the declaration will be bad. R. Lutw. 14. So in *assumpsit*, where the second count began thus: "and whereas also the defendant afterwards, to wit, on the 1st May," (which was prior to the time alleged in the first count), the court held it to be bad; for if the day after the *scilicet* were to be rejected as surplusage, no time would appear for the promise in the second count. R. after verdict, Yelv. 94. But if in such a case any word tantamount to a date be *used, although it be but an imperfect allegation, it will be sufficient; as, in *trover*, if the plaintiff say that he was possessed of goods on the 9th May, and lost them, and the defendant found them, and *postea, scil.* 1st of May, converted them, it is sufficient although the conversion is alleged to be before the loss; for the day after the *scilicet*, being repugnant, may be rejected as surplusage, and the word *postea* remaining will be sufficient. R. 2 Cro. 428. So, in *ejectment*, if the plaintiff declare on a lease made the 3d May, *virtute cujus* he entered and was possessed, till the defendant *postea scil.* 1st May, ejected him; the day after the *scilicet*, being repugnant, may be rejected as surplusage, and then the remaining words, that he entered *virtute dismissionis et postea* was ejected, are sufficient. R. 2 Cro. 96. R. 2 Cro. 136, 662, 154. R. 2 Bulst. 20. [1 Salk. 325.] cont. 1 Sid. 8. [So, where the plaintiff in covenant declared on articles of agreement dated 30th of September, 5 Geo. 1. (which was in 1718,) and charged that *postea scil.* 1st May, 1718, the defendant committed the breach of covenant complained of, it was holden sufficient; for the day after the *scilicet* being rejected as repugnant, it would then stand thus: that the defendant covenanted on the 30th of September, and *postea* committed the breach. 1 Sir. 232. So, in debt for rent, a devise of the reversion to the plaintiff being alleged, and that *postea, viz.* such a day the deviser died, being a day before the lease made; the court held it to be sufficient, for the same reason. R. Hardr. 4.] So, if there be a blank for the day. R. 2 Cro. 312. So,

where a man pleaded that before the obligation, *scil.* 1st October, and the day thus mentioned was after the obligation, the court held that, rejecting the day after the *scilicet* as repugnant, it would be sufficient. R. 1 Lev. 194. So, if a thing be coupled to a time before alleged, it will be sufficient: thus, trespass *quare clausum fregit, et adhuc et ibidem insultum fecit et cistam cepit*, is good, though no time be repeated for the taking of the chest. R. 2 Cro. 443. Or if time be alleged to a thing tantamount, it will be sufficient: as in trover, if the plaintiff shew a time of request and refusal to deliver, though no day of conversion be alleged, it is sufficient; for a refusal to deliver on request amounts to a conversion. R. Cro. Car. 262. So, to negative matter, no time need be alleged. Pl. Com. 24 a. So in real actions, no certain time is necessary: *tempore Pacis, tempore domini Regis nunc, or nuper regis*, is sufficient; R. 2 Salk. 561. [Bro. Count. 59.]; and the same in *quare impedit*; R. 2 Salk. 561; and if a more certain time be mentioned, it is not material or traversable. Id. Com. Dig. Pleader, C. 19.

Although the day, month and year must be alleged at which each material fact, stated in the declaration, took place, as above-mentioned, yet it is not in general required that the real date should be alleged, nor is the plaintiff obliged to prove the fact to have taken place upon the day stated in the declaration, provided the day be stated after a *scilicet*. 3 T. R. 68. 1 Bing. 23. To this rule, however, there are these exceptions: 1st, That in all actions on bills of exchange, promissory notes, or other written instruments not under seal, the date being a material part of the instrument, *must be stated in the declaration as it appears upon the face of the instrument; the slightest variance will be fatal. But see 2 Camp. 307. n. 4 Id. 269. Secondly, deeds must be pleaded either according to the date they bear, or to the day on which they were delivered; ante, p. 101; but if pleaded of any other day than that on which they bear date, and the plaintiff fail to prove them to have been delivered on the day of which they are pleaded, he shall be nonsuit. Thirdly, records, and all matters to be proved by a record, must be pleaded of the term, &c. of which the record purports to be, or which will appear upon the face of the record when produced at the trial: thus, in an action for a malicious prosecution, the declaration having stated that the indictment afterwards, to wit, on the 25th February 1791, came on to be tried; and by the record, when produced, the trial appeared to have been on a different day: the plaintiff was nonsuit, although the day were laid under a *scilicet*. 4 T. R. 590. cont. 9 East. 157. acc. 11 East. 508. 2 Saund. 291 b. So, in an action on a judgment, if the declaration state the judgment to have been of a term different from that which appears on the record, it is a failure of record.

1 H. Bl. 49. So in an action against an attorney for negligence, in not having prosecuted the plaintiff's debtor to judgment, the return of the writ on which the debtor was arrested being laid to be in the 25th year under a *videlicet*, and the writ itself appearing to be returnable in the 24th year, the plaintiff was nonsuit. 1 T. R. 656. And, lastly, where the precise date of any fact is necessary to ascertain and determine with precision the cause of action, any the slightest variance between the declaration and evidence in that respect will be fatal: See 3 Bing. 401: as, in an action on the statute of usury, the agreement to forbear and give day of payment was stated in the declaration to have been on the 14th, under a *viz.* but it being proved that the money was not advanced until the 10th, the plaintiff was nonsuit. 2 Saund. 291 b. Per Lawrence. J. 6 T. R. 400.

But although the date given to material facts in the declaration need not be proved as laid (except in the cases above excepted), yet care must be taken that the day laid be not repugnant or inconsistent with the date of other facts stated in the declaration. Thus, it must not appear to have taken place subsequently to the time stated in the title of the declaration, for the reasons already mentioned, ante, p. 74—77. So a breach of contract must not appear to have been prior to the making of the contract; an injury to property, prior to the commencement of the plaintiff's title to it; or the like. So, in stating the continuance of an injury, it must not appear to have commenced before the plaintiff had any title to the thing injured. Moor, 887. Hob. 169, or to have continued after the commencement of the action, 1 Vent. 103. 1 L. Raym. 329. And see Cro. Jac. 618. 2 L. Raym. 1362, or that the damage commenced before the injury was committed, 2 Salk. 663. Carth. 886. Comb. 442. 1 L. Raym. 248. 12 Mod. 131, unless the time of continuance be laid after a *scilicet*, Hob. 284. 2 Str. 1096. Andr. 250. Alleyn, 22, 23. And see 3 Lev. 246. 246. Carth. 261. 4 Mod. 152. Carth. 239. Comb. 193, or be impossible; Conyns Rep. 231, 232. See 1 Salk. 141. 1 Str. 245; otherwise if entire damages be given, the judgment may be arrested. See 2 Saund. 171. a—c. And see Com. Dig. Pleader, 3 M. 5.

It seems the omission of a date to a material fact in the declaration was not aided, even by verdict, at common law. R. Yelv. 94. R. et dicatur Cro. El. 97, 98. Per 2 J, but 3 cont. Cro. El. 377. But a mistake in the day, month or year, in a declaration, (if right in the writ, plaint, roll or record preceding, or in the same roll or record wherein the same is committed), is now aided after verdict by stat. 16 & 17 Car. 2, c. 6, and after judgment by confession or default by 4 Ann. c. 16, s. 2. See 9 G. 4, c. 15. 3 & 4 W. 4, c. 42, s. 23, post, p. 112.

Certainty as to Place.] Formerly a certain placé must have been alleged in the declaration, where every fact, material and traversable, stated in it, was done. Vide Kit. 226. [This however must be understood of personal actions and ejectment only; for in real and mixed actions (with the exception of ejectment), it was not usual to count of the place. Bro. Count. 59. Com. Dig. Pleader, C. 7. Yet even in these real and mixed actions, the parish and county where the lands lie were always stated as matter of local description, though no place was alleged to any of the other facts stated in the count.] Now, by Reg. Pl. H. 4 W. 4, I. s. 8, the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration or in any subsequent pleading: provided that in cases where local description is now required, such local description shall be given. And by Reg. Pl. 4 W. 4, V., s. 1, "in actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially."

Inserting special venue in a declaration, contrary to R. H. 4 W. 4, s. 8, is not the subject of a demurrer, but of an application to a judge at chambers to strike it out. *Tanner v. Champneys*, Bart., 4 Tyr. 859.

A description of lands by abuttals, in an action of trespass, cannot be objected to at the trial. *Lampriere v. Humphrey*, 3 Ad. & E. 181.

In local actions, the county stated as venue, we have seen (ante, p. 77.), must be that in which the cause of action arose; and the plaintiff at the trial will be confined in his proof to that county. But if the parish &c. be stated, he will not be confined in his evidence to that parish, but may prove the cause of action to have arisen in any other parish within the county; except in actions upon statutes, where a part of the penalty goes to the poor of the parish, in which case the offence must be proved to have been committed in the parish laid in the declaration; and except in actions against hundredors, in which the robbery must be proved to have been committed within the hundred. But if the parish or place be mentioned as matter of local description, where a local description is requisite, it must be proved strictly as laid. As in an action for non-residence, the parish was styled in the declaration St. Ethelburg, and the real name appearing in evidence to be St. Ethelburga, it was holden a fatal variance. 2 B. & P. 281. But where in ejectment the premises were laid to be in Farnham, and proved to be in Farnham Royal, it was holden not to be a fatal variance, unless it were shewn that there were two Farnhams. 13 East, 9. See Str. 595. If in an action for a nuisance in erecting a weir, it be described in the

declaration to be at H, and be proved to be at a lower part of the same *water called T, the variance is fatal. 2 East, 500, but see Id. 497. But in a declaration for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a common bawdy house, where the house be described as situate in A. street, in the parish of O. A. (there being no such parish), and the nuisance stated to have been erected in the parish aforesaid; as this was not a local action, the parish and street stated were not deemed local description, but were ascribed to venue, and therefore not material to be proved as laid. 11 East, 226. So, in assumpsit for use and occupation, it is not necessary to state in what parish the premises are situate. 1 Taunt. 570. See 1 B. & P. 225. But see 3 Camp. 235. cont. So in an action on the case for negligence, proof that the defendant's boat ran down the plaintiff's, in the half-way Reach in the Thames, will support an allegation that the boat was run down in the Thames *near* the half-way Reach; for the place is not material. 4 T. R. 558. But in general, in actions on contracts, if the name of a place form a material part of the description of the contract, it must be proved as laid, and the slightest variance will be fatal. As where in covenant the premises were named in the declaration the "Cellar-beer Field," and in the lease the "Aller-beer Field," this being part of the description of the deed declared on, the variance was deemed fatal. 9 East, 188. So, where the defendant's tenancy of land in F. was alleged as the consideration for his promise to manage it in a husbandlike manner, and it was proved that the land was in F. and C., this was holden to be a fatal variance. 4 Taunt. 700. So, in an action for seaman's wages, the voyage being described as from "London to Africa, and from thence to the West Indies," but in the articles, called a voyage "from London to Africa and from thence to the West Indies or America, and afterwards to London or other port of delivery," the variance was deemed fatal. 2 B. & P. 116. But where an action upon an agreement to procure the plaintiff a booth at a horse-race on Barnet Common, the declaration stated the common to be in Middlesex, whereas it is in Hertford, the court held the variance to be immaterial; for the county was no part of the description of the contract, and might therefore be rejected as surplusage. 4 T. R. 561 n.

In actions in inferior courts, it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction; therefore as well the consideration of the promise, as the promise itself, must be laid in the declaration within the jurisdiction; 1 Saund. 74. (n. 1.) 1 Lev. 50. 69. 96. T. Raym. 75. 1 Lev. 104, 105. 137. 153. 156. 2 Lev. 87. 1 Vent. 243. 1 Sid. 87. 1

Vent. 2. 2 L. Raym. 1310, 1311. 796. 1 Salk. 404. 2 Wils. 16. 1 T. R. 151. Cro. Jac. 96. Bac. Abr. Pleas, E. 1; otherwise it is error, even after verdict. 1 T. R. 152. But as to such matters as are inserted merely for aggravation of damages, and which might be omitted and yet the action remain, it is not necessary to lay them within the jurisdiction. 2 Salk. 404. Cro. Car. 570. 1 Ro. Abr. 546. pl. 4. W. Jon. 448. 1 Saund. 74. (n. 1.) The courts of the counties palatine, however, as also the court of Great Sessions in Wales, and the court of Ely, are not inferior *courts within the meaning of this rule. 1 Saund. 73. 1 Lev. 208.

The want of a right venue, in the margin of the declaration, is aided after verdict, so as the cause be tried by a jury of the proper county where the action is laid, by 16 & 17 C. 2. c. 8; and after judgment by confession or default, it seems, by 4 Ann. c. 16, s. 2. Lutw. 239. Barnes. 483. But as to special venue, namely, the county or place formerly laid in the body of the declaration to each material fact, we have seen (ante, p. 104,) that it is now altogether abolished.

It must be certain as to the thing demanded, &c.] A declaration should have certainty also of the thing demanded: and therefore in trespass for taking the plaintiff's fish, the declaration is bad if it do not shew the number and kinds of fish in certain. R. 5 Co. 35. R. 1 Vent. 272. Dub. 1 Vent. 329. [So, trespass *quare arbores succidit ad valentiam*, &c. was holden insufficient, for not stating the kind of trees. 1 Vent. 53. So, trespass for taking away *diversa bona et catulla*, is bad. Fort. 377. Str. 637. 2 L. Raym. 1410.] So, if it be *quare diversas pecias maherunii asportavit*, it is bad for uncertainty. R. 2 Vent. 263. So, *quare duas acras terræ fodit et asportavit*, not shewing the quantity of the land taken away, is bad. R. after verdict 2 Vent. 174. So, *quare cistas cepit et vestimenta in cista prædicta*, without saying in which of them. Al. 9. So, *quare clausum fregit, et diversa onera equina terræ asportavit, per quod viam amisit*. R. 2 Vent. 73. So, *quare cepit quandam parcellam lanæ*. R. 2 Lev. 195. So, trover for two pair of pothooks, &c. and hangers, there being several words between them, is bad, for the uncertainty of the word "hangers." T. Raym. 2. So, trover for a beam, scales and weights, was holden bad as to the weights, the number and weights of them not being mentioned. So a declaration in trover, containing these words "*cum aliis utensilibus*," was holden bad, for not stating the number and kind of utensils. 3 Lev. 18, and see post, B. 4. title "Trespass," "Trover." But when several things form a whole, for which there is a known technical name, it is sufficient to state the whole by its technical name, without enumerating the several things of which it is composed; as in trover *pro decem paribus velorum et tegulorum*, *Anglice* curtains and vallance

it is sufficient, without shewing the number of yards or the stuff of which they are made. 2 Saund. 74.] In an action on the case for disturbing him in his pasture, if the plaintiff say *quod ipse cum quibusdam aliis tenentibus per copiam, &c.* have the sole pasture, without saying with whom in particular, it is bad. R. 2 Lev. 178. So in an action against the hundred, the declaration is bad, if it do not shew the goods stolen, with certainty. Adm. 2 Saund. 379. So, in debt for an amercement the declaration ought to shew the certain sum at which the defendant was amerced, and it is not sufficient to say at what sum it was altered. R. 3 Lev. 206. So debt *pro 40 quarteriis frumenti*, without saying of what species, is bad; Cro. El. 837; or *pro 40 ulnis pannæ*, without saying of wool or of what other material. Id. Com. Dig. Pleader, C. 21. In actions where damages merely are recovered, however, that great strictness in particularizing the things demanded, or for the taking *&c. of which damages are sought to be recovered which was formerly required, is not at present insisted upon. Thus a declaration in trespass for breaking and entering a house, and carrying away "divers quantities of China ware, earthenware and linen, was holden good. Barnes, 276. So trover for 70 ounces of cloves, mace and nutmegs without saying how many ounces of each was holden good. 1 L. Raym. 588. So, trover for two bundles of flax, without shewing the quantity, has been holden to be certain enough. 2 L. Raym. 991. So, trover for a piece of tape, without stating how many yards, has been holden sufficient. 2 Str. 738. So trover for a parcel of diamonds, 2 Str. 827, or a parcel of pack-cloths, wrappers and cords, 2 L. Raym. 1529. 2 Str. 809, has been ruled to be certain enough. So in assumpsit, the common *indebitatis count* for goods sold and delivered, without stating what goods, is sufficient. In actions upon written instruments, however, the declaration should state the contract with as much particularity as it appears in the instrument. And in other cases in assumpsit, the cause of action should be stated with sufficient particularity, to afford the jury the means of estimating the damages; and therefore where, in assumpsit for not delivering 40 bags of wool, the declaration stated the agreement to deliver them at a certain price per pound, without stating what price, the court held it bad upon special demurrer; for without a price stated, no measure was given to the jury for estimating the damage the plaintiff sustained by the non-delivery of the wool. 13 East, 102. So a declaration in assumpsit, stating the defendant to be indebted to the plaintiff in 500 quarters of wheat, for tolls, without stating any value, was holden bad upon special demurrer. 4 B. & A. 268. And in actions where damages are not the sole object of the action, as in detinue, for instance, the ancient particularity is still requi-

red. And in replevin, where the declaration was for taking divers goods and chattels of the plaintiff, it was holden bad for uncertainty. 7 Taunt. 642. So, in actions upon statutes, every fact and circumstance necessary to shew that the case is within the statute, must be stated with certainty. See 6 T. R. 771, and post. The usual way of objecting to a declaration for uncertainty in the thing demanded, &c. as above mentioned, is by special demurrer; but it seems that it is not aided by verdict, either at common law, R. 5 Co. 35 b. R. Cro. El. 817, or by stat. 16 & 17 C. 2, c. 8; R. 1 Vent. 172; nor aided after judgment by default: 7 Taunt. 642; and that advantage may be taken of it, either by motion in arrest of judgment, Id. Fort. 377. Str. 637. 2 L. Raym. 1410. 2 Lev. 195. 2 L. Raym. 991, or writ of error, 1 Lev. 303. 1 Vent. 317. 2 Str. 827. 810, or by demurrer, general or special, at the defendant's option.

The declaration must also shew plainly and certainly all circumstances material to the maintenance of the action; for if there be two intendments, it shall be taken most strongly against the plaintiff. Pl. Com. 202 b. As in debt upon a contract to pay 20s. upon waste done, and the plaintiff avers that the defendant committed waste, this is not sufficient, without stating how the waste was done. [So stating waste to have been committed by taking planks and a manger out of a stable, is insufficient, without stating the planks and manger to have been fixed to the freehold. Dy. 108.] In rescous of a *distress for rent, the plaintiff ought to shew on what days the rent is payable. Kit. 227 a. In an action on the case by a parson for dilapidations, who entitles himself by the resignation of B., he ought to shew how the resignation was made. R. Lutw. 116. In an action upon the case for overloading his horse, he ought to shew how or with what weight he overloaded him. R. 2 Leon. 104. Com. Dig. Pleader, C. 22. So, where a submission to an award stated that the award was to be in writing under the hand of the arbitrator; in pleading the award, it must be alleged to be under the hand of the arbitrator, as well as in writing. 6 Taunt. 645. But where a custom was alleged that such a one should have his freedom upon paying a reasonable fine, and the custom proved was that he should pay 6s. 8d., it was holden to be sufficient. 2 Str. 1070. So the statement of negative matter does not require so much certainty: as, in an action on the case for taking insufficient pledges, the general averment that he has not taken sufficient pledges, is sufficient, being in the negative. R. Lutw. 159.

What degree of certainty requisite.] But certainty to a certain intent in general, is sufficient in a count. Co. Lit. 303. As in assumpsit to pay so much if plaintiff marry his daughter at his request, if the

plaintiff say that he did marry her, without saying "at the defendant's request," it is sufficient; for the request shall be intended. R. Cro. Car. 194, 195. In account as receiver until the feast of St. Michael, without saying whether St. Michael *in Tumba*, or St. Michael the Archangel, yet good; for it shall be intended St. Michael the Archangel, which is most known. In debt on an indenture, which contains an agreement between him and A. to marry if the ecclesiastical law permit; if he count of a request to marry and that A. refused, it is sufficient, without saying that he requested her to marry at a canonical time. In an action on a statute which gives to all subjects, &c. if the plaintiff allege that he is *modo subditus*, it shall be intended that he was so at all times. R. 1 Lev. 121. In assumpsit to satisfy for goods, if he say that so much is *minus satis*, to satisfy him, it is sufficient; for if the plaintiff do not demand more, he must be content with so much. R. 2 Cro. 552. Com. Dig. Pleader, C. 24. In debt against a sheriff for money levied on a *feri facias* issued out of B. R. on a judgment of C. B., it is sufficient to say that the record was duly removed into B. R., without saying how, whether by writ of error or otherwise. R. Cro. Car. 539. So in an action of assumpsit against a wharfinger, to whom goods were sent to be shipped, for neglecting to take out a sufferance, for want of which the goods were seized and condemned, it is not necessary to aver or prove that the goods were condemned by a sentence *in rem*. 1 T. R. 171. So where an act is legal at common law, but certain formalities are afterwards rendered essential to its legality by statute; in pleading the act, these formalities shall be intended, and need not be stated in the declaration. But where an act depends entirely upon a statute for its legality, in pleading the act, all the formalities, &c. required by the statute, must be stated in the declaration. Thus in pleading a lease for above three years, or an assignment of a term, or an agreement to pay the debt of another, the declaration need not state that the lease, assignment or agreement was in writing; but in pleading a devise of real estate, it is otherwise; for the lease, assignment and agreement might have been by parol at common law, although now required to be in writing by the statute of frauds; but the statutes of wills, 32 H. 8, c. 1, 34 H. 8, c. 5, first allowed of devises of real property generally, and they require such devisees to be in writing. 1 Saund. 276 a. (n. 2.) And see 6 Bing. 529.

And words shall have a reasonable intendment. Therefore in assize, if a man complain that the king, seised of such a park, granted *officium parci sui*, without saying *prædicti*, yet it is good; for it shall be intended the park before mentioned. 8 Co. 57. So, if the plaintiff allege a demise to A. *virtute cujus* he entered, it shall be intended that he entered

immediately. R. Lutw. 108. If a *capias utlagatum* or other judicial writ be pleaded as issued such a day, and it is not said to have issued in term time, yet it is good; for it shall be intended to have issued in term time, if nothing appear to the contrary. R. Lutw. 333. If it be pleaded that A. was seised, and that *he* died seised, without saying who, it shall be intended that A. died seised. R. Lutw. 1172. If an usurious agreement be alleged between A. and B., and that A. the lender *pro dando diem solutionis* to A. *haberet* so much, it shall be intended that it was *pro dando B. diem solutionis A. haberet*, &c. 1 Salk. 325. If the declaration say *quod defendens prosecutus fuit et adhuc prosequitur* suit, it shall be intended at the time when the action was commenced. R. 3 Mod. 103. 4 Mod. 152. [If the declaration state promissory note to be made the 2d November, to pay on the 31st December *next*, it shall be intended next after the date of the note, and not next after the action brought. 1 Str. 394. If a declaration state *quod defendens quendam canem ad mordendum oves consuetum scienter retinuit*, it is tantamount to saying *quod retinuit quendam canem sciens canem prædict' ad mordendum oves consuetum*, for the *scienter* goes to all the preceding matter. Bac. Abr. Pleas, B. 5. s. 4. And see Carth. 90. If a declaration state an agreement to sell oats at so much per bushel, it shall be intended to mean the Winchester bushel; and the declaration is not maintained by evidence of an agreement to sell by any other bushel. 4 T. R. 314.] If a declaration in waste state *quod A. jeoffavit B.*, to the use of C. and his heirs, it is sufficient, without saying *quod jeoffavit B. and his heirs*. R. Mo. 871. So, if an action be several in its nature, such precise certainty is not required: as in an action on st. 2 & 3 Ed. 6, by the rector of the churches of D. and S. for not setting out tithes on 400 acres of land in D. and S., it is sufficient, without saying how much land in D. and how much in S. this action being in the nature of trespass. R. 2 Lev. 1. Com. Dig. Pleader, C. 25.

And general words are sufficient, when the certainty lies within the defendant's notice. [See 14 East, 291.] So if the words ascertain the lands in demand, it is sufficient to plead a conveyance of them *inter alia*. Lutw. 1007. Com. Dig. Pleader, C. 26.

So, general words are sufficient, where they are ascertained by other circumstances: Thus, trespass *quare cistum fregit, et diversu vestimenta in cista prædict' existen' cepit*, is good, without saying what vestments; R. Al. 9, *quare domum fregit et separules claves *pro operiend' ostia domus prædict' cepit*; R. 2 Salk. 643; *quare clausum fregit et spinas suas ad valent' so much succidit*. R. 2 Cro. 435. [See Bac. Abr. Trover, F. 1.] So debt for 20 *par' caligur'*, without saying of wool, silk, &c. or for so many *par' calceorum*, or for so many loaves *panis*, with-

out saying of what grain, is sufficient ; for when a thing is converted to another species, a declaration by the name of the species is good. Cro. El. 837. If a man prescribe to inclose lands lying together in a common field, and he say that he inclosed, this imports that they lay together. R. 2 Mod. 104. Com. Dig. Pleader, C. 27. Where in an action for a hawk, the plaintiff said that he was possessed of it *ut de bonis propriis*, this was holden to imply that the hawk was reclaimed. Dy. 306 b. If one claim as heir, this implies that the ancestor is dead, and the death need not be shewn. 33 H. 6, 54. So in *quare impedit*, if the plaintiff allege that the church was void by the death of A., this implies that A. was inducted, and that fact need not be stated. Dy. 360 b. So where the writ was *quare impedit ipsum presentare ad medietatem ecclesie*, this was holden to imply that there were two patrons and two incumbents. See 10 Co. 136 a. Also where the parties claimed to present by turns to an advowson appendant, it was holden that they need not shew that the advowson was so presentable by prescription, for its appendancy to the manor implied a prescription *ex necessitate*. Dy. 299. So, the words "indenture," "deed," or "writing obligatory," import a sealing, and a declaration using any of these words will be good, without stating that the party sealed the instrument. 4 Leon. 175. Cro. El. 737. Cro. Jac. 420. 2 Vent. 107. 6 Mod. 306. 1 Str. 512. 2 Id. 815. 2 L. Raym. 1538. 2 Ro. Rep. 223. Per Houghton, J.

So, precise certainty is not necessary for a thing collateral to the action ; as in an action on the case, for putting into his close carrion which died of the murrain, *per quod diversa averia* died, it is sufficient, without saying what or how many beasts ; for the action is not for the beasts or the value of them. R. Al. 22. [1 Keb. 825.] If the plaintiff allege *quod quedam pars domus fuit in decasu*, and in consideration the plaintiff would repair, the defendant *assumpsit* &c., he need not say what part of the house was decayed. R. 2 Leon. 53. Com. Dig. Pleader, C. 30.

So, exact certainty is not necessary when a thing is alleged only as inducement. [Doct. Pl. 283. Co. Lit. 303 a.] As, if a man claim a thing appurtenant to an office, and not the office itself, it is sufficient to say that it is *antiquum officium*, without prescribing for it. R. 10 Co. 59 b. So, if he claim a thing by custom in such a will, it is sufficient to say *quod est antiqua villa*. 10 Co. 59 b. If an assumpsit be brought on a promise to give so much with his daughter as he agreed to give with A., it is sufficient to say he agreed to give so much with A., without shewing how or with whom he agreed. Dub. Yelv. 17. So, in an action on the case against a bailiff for not taking sufficient pledges, it is sufficient to say that he gave him the usual fees, without saying how much ;

for the demand is not for fees. Latch. 159. In an action on the case for diverting a watercourse, if he allege seisin for life, it is sufficient, without saying for his life or the life of another. R. Cro. El. 112; *113. In an action for slandering his title, if he say that he was seised &c., it is sufficient, without saying of what estate. In an action on the case, if he recite a recovery in an inferior court, it is sufficient, without shewing by what authority. R. Cro. El. 218. In an action for disturbance of common, it is good, though the precise common be not alleged; R. 2 Cro. 630; or for throwing down his hurdles, it is sufficient to prescribe for erecting *in aperta plated* and taking *diversas denar, summas*, without describing the place or ascertaining the money more exactly. R. 1 Leon. 108. In an action on the case by a lessee for disturbing him in his toll, it is not necessary to say what title the lessor had when he demised. R. Owen, 109. In a *formedon in reverter* or *remainder*, it is unnecessary to shew the death of the particular tenant. R. Pl. Com. 32 b. Com. Dig. Pleader, C. 31. In debt upon a lease for years for rent, it is not necessary to allege the number of years in certain; for the lease is but inducement to the action. 36 H. 6, 25. So, in covenant it is sufficient to say that by indenture he demised, without shewing by what title he was seised; or that being possessed for years he demised, without saying by what title or for what terms possessed. R. Carth. 30. So, in an action upon the case for a nuisance, if the plaintiff allege that he was possessed for a term of years, it is sufficient without shewing the commencement of the term; for the title is only inducement to the action. So, if he say that he was possessed, it is sufficient without saying for years. Lutw. 120. [See ante, p. 92.] So, in all cases where a title is only conveyance or inducement to the action, it need not be alleged precisely. Com. Dig. Pleader, C. 48.

It must be positive.] The cause of action must be stated positively; that is, the declaration must directly affirm that the defendant did so and so, or promised so and so, or did not pay &c. as the cause of action may be. Therefore where a declaration in trespass stated *quod cum* the defendant did the thing complained of, it was holden bad; 2 Bulst. 215. 2 Lev. 206. 2 Show. 27. 295. 2 Salk. 636. 2 L. Raym. 1413. 2 Str. 1151. 1162. and see *Id.* 681. So, where the declaration was *quare* the defendant did the thing complained of, it was holden bad; 2 Salk. 636: because neither of these declarations amounted to an affirmative charge, but the first stated the cause of action by way of recital, and the second by way of interrogation. A defect in this respect is a defect in substance, and not cured by verdict; Bac. Abr. Pleas, B. 5, s. 4; and consequently may be taken advantage of upon

démurrer, by motion in arrest of judgment, or writ of error: but in the Court of Common Pleas it was formerly holden to be cured by the recital of the writ in the declaration. Barnes. 249. 1 Wils. 99. Barnes, 452. Andr. 21. 1 Barnard, 423. 176. 2 Wils. 203. If the plaintiff however declare *quod cum* the defendant *concessit se teneri* or *quod cum mutuatus fuisset et non solvit*, or *quod cum demisit*, and the defendant *ejecit*, in these cases there is a positive charge upon the defendant, the second branch of the period being positively affirmed, and the first, although introduced with a *quod cum*, yet taken together with the second, and as forming part of the same sentence, being considered *sufficiently positive. Bac. Abr. Pleas, B. 5, s. 4. So, where the first count in a declaration in trespass began "*quod cum*," and the second "*pro eo quod*" merely, and the jury found for the plaintiff on the second and for the defendant on the first count; the court held that the defect in the first count could not affect the second, and that it was cured by the finding of the jury. 1 Str. 681. So, in an action of debt upon a statute for a penalty, the offence being alleged with a *quod cum*, and the declaration objected to on this account, yet the court held it good, because the non-payment of the penalty is the cause of action, and the offence merely inducement. 1 Show. 337. Carth. 216.

So, it has been holden, ill, after verdict, to say that by a certain indenture *testatum existit* that he demised, because there is no positive affirmation that there was a demise; Bac. Abr. Pleas, B. 5, s. 4. Lutw. 535. 875. Dy. 118 b. and see 1 Lev. 12. 75. 1 Saund. 275. Yelv. 18; but this it should seem must be understood of cases where the deed is not merely inducement to the action; see 1 Saund. 274. (n. 1.); and in covenant if the plaintiff declare *quod per quondam indenturam testatum existit* that the defendant did covenant, this with a *profert* is sufficient, because when he says that the indenture attests that he did covenant, this is a certain allegation there was such an indenture, and the indenture alone is traversable on the issue of *non est factum*. Bac. Abr. Pleas, B. 5, s. 4. And in general indeed *testatum existit* seems sufficiently certain in a declaration, for the deed is seldom more than inducement to the action; but in pleas, avowries, and replications, &c. being the substance of the answer &c, it would clearly be bad. 1 Saund. 274. (n. 1.)

It must not be repugnant or insensible.] So, if the declaration be repugnant or insensible, it will be bad: as, in trespass for taking away timber *jacen' erga confectionem domus nuper ædificat'* for it cannot be for the building of a house which is already built. R. 1 Salk. 213, 458. So, in covenant, and a breach assigned *quod durante tempore quo servavit*, he departed from his service. R. 1 Salk. 213. So, if the

declaration have a blank for the day or place or other material thing, whereby it is insensible, it is bad. R. 2 Cro. 498. Com. Dig. Pleader, C. 28. So, where the Bank of England agreed to discount bills to the amount of 100,000*l*. for A., upon the security of B.; and B. gave this security upon C.'s agreeing to indemnify him; the bills were discounted, and B. was afterwards obliged to pay the Bank the amount of them: In an action by B. against C. upon his indemnity, the declaration stated the bills to have been drawn and the money advanced on the 28th of August 1810, at Westminster; and that before they became due A. became unable to pay &c.; by reason of which plaintiff became damnified, and was obliged to pay, and did *then* and there necessarily pay the bank 100,000*l*.: the court held the declaration bad upon special demurrer; for the word "then" referring to the 28th August, it appeared as if B. had been obliged to repay the Bank the 100,000*l*. on the very day the bills were drawn and the money advanced, which was repugnant and senseless. 14 East, 291. So, formerly, if a declaration stated a judicial writ to have issued on a day which happened *to be out of term, it was holden repugnant and bad on a special demurrer. 3 T. R. 184. n. 183. 1 Saund 300 b. (n. 7.) So, if a man plead *per factum suum datum primo die Januarii et deliberatum quarto die Januarii*, it is repugnant, and bad; for it could not have been *factum suum* on the 1st of January, unless it were then delivered. Dy. 221. So, where plaintiff declared for the battery of his servant on the 20th January, *per quod servitium amisit* for a long time to wit, from the 20th of March aforesaid to the 1st day of March then next following: the Court held the declaration bad for repugnancy, even after judgment by default and a writ of inquiry executed. Cro. Jac. 618. But where in debt on simple contract, the sum demanded in the commencement of the declaration exceeded the aggregate of the sums in the different counts, the Court held the repugnancy to be immaterial; for the demand in the commencement of the declaration might be rejected as surplusage. 1 H. Bl. 249. and see Latch. 175. Noy, 44. Yelv. 5. 1 Saund. 282. So, in assumpsit for money had and received by the defendant for the plaintiff, *ad usum* of the defendant, the court after verdict held that the words "*ad usum* of the defendant," being repugnant and insensible might be rejected as surplusage. 1 Salk. 24. 1 L. Raym. 669. Comyns Rep. 115. 12 Mod. 510. 1 Sid. 306. 2 Keb. 615. So, in general, if the repugnancy be in an immaterial part, it may be rejected as surplusage, especially after verdict. Bac. Abr. Pleas, l. 4, see ante p. 98. But an allegation in pleading, which is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, cannot be rejected as surplusage, though laid under

a *videlicet*, however inconsistent it may be with an allegation subsequent; 5 East, 244; unless indeed it were unnecessary to state or prove it, in order to maintain the action. 2 B. & C. 2.

It must not be scandalous.] The rule as to referring pleadings to the master, for scandal and impertinence, is the same in the courts of law as in courts of equity. Where the declaration in an action by a surgeon contained counts for curing the defendant of the *foul disease*, the Court referred it to the master, and ordered the offensive words to be struck out, and exemplary costs given. 2 Wils. 20. see 2 Arch. Pr. C. B. 195.

It must be true.] First, as to the *time* at which material facts are stated in the declaration to have happened: in actions upon bills of exchange, promissory notes, and other written instruments, the true day upon which they purport to bear date, &c. must be stated; for it is a material part of the instrument, and the slightest variance between the date &c. of the contract laid, and of that proved at the trial, will be a sufficient ground for nonsuit. Ante, p. 102. See 2 Camp. 307. n. 4 Camp. 209. And the same, as to the date of records, or other time to which they relate. Ante, p. 103. So, where the precise date of any fact is necessary to ascertain and determine with precision the cause of action, the true date must be laid, otherwise the plaintiff must be nonsuit, ante, p. 103, and see 8 Bing. 225, whether the date be laid after a *scilicet* or not. Ante, p. 103. But in all other cases, any date within the time of limitation, *will be sufficient, if pleaded after a *scilicet*, provided it be not repugnant or inconsistent with the date of other facts stated in the declaration. Ante, p. 102.

Secondly, as to the place at which material facts are to be proved to have happened; we have seen (ante, p. 104,) that in local actions the county where the lands lie must be stated in the margin of the declaration; and in proof they must appear to be within the county. In trespass *quare clausum fregit*, the abutments must be set forth, and must be proved as laid; Id.; and the same in all other cases where the place stated in the declaration is matter of local description, and such local description is requisite. Ante, p. 104, 105. In actions against hundredors, the cause of action must be laid to have arisen within the hundred, and be proved as laid; and in actions upon statutes, where a part of the penalty goes to the poor of the parish, the cause of action must be alleged to have arisen within the parish, and be proved as laid. In all other cases, in actions, local or transitory, the parish or place need not be stated, nor, if stated, proved, unless the place form a material part of the description of the contract or other cause of action declared upon. See 4 Bing. 706. But in all cases where the place &c. is material, if not proved as laid, the plaintiff must be nonsuit.

Lastly, as to the cause of action: contracts must be set forth truly; the slightest variance in substance between the contract laid and that proved, will be fatal. 1 T. R. 240. 2 Stark. 60. Thus, where a bill drawn by John Crouch, was declared upon as drawn by John Couch, the plaintiff was nonsuit. 3 B. & P. 559. and see 6 Bing. 110. So in an action for usury in discounting two bills, one of which was described as drawn by B. on a certain person, to wit, John K.; and the bill when produced appeared to be drawn upon Abraham K.; the variance was holden fatal. 4 Taunt. 810. So, in covenant on a lease, a mistake in the name of a person, stated in the demise as late tenant of the premises, was holden a fatal variance. 1 Camp. 195. see 1 Brod. & Bing. 443. So, in an action for use and occupation by a dean and chapter, where the name of the present dean was mentioned in the beginning of the declaration, and the occupation was stated to be by permission of the said dean and chapter, but the occupation proved was by the permission and in the time of the former dean, it was holden a fatal variance. 1 Camp. 466. See 1 Bing. 355. But where in debt on a mortgage-deed, the plaintiff declared that the defendant bound himself, *his heirs*, executors, &c. and the word *heirs*, was not in the deed produced, the Court held this not to be a fatal variance; for the action being against the party himself, the word *heirs* might be rejected as surplusage. 4 M. & S. 474 n., and see 1 B. & A. 57. 4 Bing. 203. So, where in a declaration against several as drawers of a bill of exchange it was stated that they made their certain bill of exchange in writing, their own proper *hands* being thereunto subscribed," and the bill produced was signed "Mars & Co." (which was the defendants' firm), Lord Ellenborough refused to nonsuit the plaintiff. 2 Camp. 305. So, where the declaration stated the bill to be for value delivered, and the bill produced was for value received, the variance was holden to be immaterial. *Id.* 306.

*A variance in setting out one of several covenants in a lease, viz. the "Cellar beer Field," instead of the "Aller-beer field," was holden to be fatal; 9 East, 188; because the name of the field formed a material part of the description of the contract. So, where the plaintiff declared in covenant, that the defendant devised to him a wharf and store-houses, and in the deed it was "store-house;" this was holden a fatal variance, even although the breach assigned had no reference to the store-house. 4 M. & S. 470, see 6 Taunt. 394. 3 M. & S. 169. So, where the declaration described the lands to be in the parish of B. and M., and in the deed it was "the parishes" of B. and M., it was holden a fatal variance. 6 Taunt. 394, and see 2 Camp. 274, S. P. 4

Taunt. 671. So, where the declaration stated that by a certain indenture it was witnessed that in consideration of certain furnaces to be erected by the plaintiff, A. B. did demise &c. ; and the deed produced in evidence was, in consideration of the erection of the furnaces and also for building certain houses and payment of rent, A. B. did demise &c. : it was holden a fatal variance. 2 Barn. & Ald. 765, and see 4 Camp. 20. 3 Camp. 247. 1 Stark. 69. 2 Id. 60. 1 B. & A. 9. 2 B. & B. 395. 359. 3 Bing. 472. 2 B. & Ad. 232. So, where the declaration in an action for seamen's wages described the voyage as "from the port of London to the coast of Africa, and from thence to the West Indies," and upon the ship's articles being given in evidence it appeared that the voyage was "from the port of London to the coast of Africa, from thence to the West Indies or America, and afterwards to London or to her delivering port in Europe," the variance was fatal. 2 B. & P. 116. So, in an action against a carrier, where the declaration stated the contract to carry from B. to C., and the contract proved was to carry from A. to C., it was holden a fatal variance. 2 Stark. 385, but see 4 Bing. 706.

Under a count for money had and received by three defendants, it was holden that the plaintiff could not give in evidence money had and received by them and by a fourth partner who had since died. 6 T. R. 363. But in a recent case, which was an action against three defendants as acceptors of a bill of exchange, and the bill, when produced, appeared to be accepted by four, the court held that no advantage could be had of this as variance, but the defendants should have pleaded the non-joinder in abatement. 1 Barn. & Ald. 224. So, an averment that stock was to be transferred on request, was holden not to be proved by evidence that it was to be transferred on a certain day. 5 East, 111, see 2 Barn. & Ald. 335. So, where the plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred in an action of covenant for the money that the houses were built in the time ; evidence that the time had been enlarged by parol agreement, and the houses built within the enlarged time, was holden not to support the declaration. 3 T. R. 590. So, if a contract be in the alternative, if not declared upon as such, the variance will be fatal ; therefore where one of two counts in a declaration stated the contract to be to deliver 40 sacks of wheat on a certain market day, and the remainder of 100 sacks at the next market-day ; and the second count stated it to be, to deliver 50 sacks on the first market-day, &c. ; and the evidence was of a *contract to deliver 40 or 50 sacks on the first market-day : the court held the variance to be fatal. 2 East, 2, and see Id. 4, n. So it was holden that a corrupt agreement for the forbearance of money till one or other

of two days, at the option of the borrower, should be pleaded, according to the fact, in the alternative; and that if stated as an absolute forbearance till one of those days, the evidence would not support it. 3 T. R. 531. So, when the contract declared upon was that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the contract proved was, that he should deliver it at 4s. per stone, "and so much more as the plaintiff paid to any other person:" the court held this to be a fatal variance. 1 T. R. 447. 3 Bing. 472. 2 B. & Ad. 232. But where a sum thus stated is not descriptive of the contract, but merely of the entire sum which the plaintiff seeks to recover as his debt or damages, it need not be proved as laid: thus in debt on simple contract, the plaintiff may recover a less sum than he demands in his declaration. 1 H. Bl. 249. So in *indebitatus assumpsit*, the amount of the debt need not be proved as laid. Where a certain sum of money, however, is stated as the consideration of a promise, and not laid after a *videlicet*, it must be proved as laid. Therefore, where the declaration stated the consideration to be the purchase of sheep for 54*l.* 11*s.* 6*d.*, and the price proved was 54*l.* 12*s.* 6*d.*, the plaintiff was nonsuit for the variance. 3 T. R. 67, cit. and see 3 Bing. 472. 2 B. & Ad. 232. So where the consideration stated was the forbearance of payment of 21*l.* 6*s.* 0*d.*, and the sum proved was 20*l.* 18*s.* 0*d.*, it was holden a fatal variance. 3 M. & S. 173. But where, in a declaration on stat. 11 G. 2, c. 19, s. 3, for double value of goods removed to prevent a distress, it was averred that 57*l.* was due for rent before the removal of the goods, the court held that this averment need not be proved as laid; because it was immaterial what rent was due, the action being, not for double the amount of the rent, but for double value of the goods removed. 3 T. R. 643. In debt or covenant for rent, however, if the rate of rent per annum be misstated; see 4 Taunt. 370; or in debt or assumpsit on a bill of exchange or promissory note, if the amount of the bill or note be misstated, the plaintiff must be nonsuit; because the sum in these cases is a part of the description of the contract itself. But if it be stated in substance, it will be sufficient: as where in an action for usury, the declaration stated a specific sum to have been lent, but the evidence was of a loan, part in money, and part in gold of a known definite value which the party borrowing had agreed to take as cash: the court held that the evidence supported the declaration. 1 H. Bl. 283. 5 Taunt. 288. 1 Marsh. 33. In an action by the consignor of goods against a carrier for non-delivery of them, the declaration stated, that in consideration of the hire to be paid by the plaintiff, the defendant undertook to deliver &c., and the evidence was that the hire was to have been paid by the consignee, it was holden not to be a variance, the

consignor being liable by law. 1 T. R. 659. In an action on a policy of insurance, the declaration stated that after the making of the policy the ship sailed, and the evidence was that the ship sailed before; yet the court held that the variance was immaterial. 5 T. R. 496. So, if the quantity of any thing sold, or the price at which it is sold, be stated after a *videlicet*, a variance *between the statement and proof in these respects will not be material. 6 Taunt. 107, see 13 East, 410.

So, the greatest care must be taken in the description of a record; for the slightest variance, in substance, between the record set out and that produced in evidence, will be fatal. Thus, if a declaration state a judgment to be against one defendant only, when it is against more than one, or recovered of a term different from that which appears upon the record, the variance is fatal. 1 H. Bl. 49. So, an allegation that the plaintiffs "by the judgment of the court recovered" against the bail, &c. is not proved by the production of the recognizance of bail, and the *scire facias* roll, with an award of execution; for that is not a judgment to recover. 11 East, 516. So, in an action for a malicious prosecution, the declaration having stated that the indictment afterwards, to wit, on the 25th day of February 1791, came on to be tried, and by the record, when produced, the trial appeared to have been on a different day, the plaintiff was nonsuit, although the day was laid under a *scilicet*. 4 T. R. 590, *contra* 9 East, 157. acc. 11 East, 508. So in an action against an attorney for negligence, in not having prosecuted the plaintiff's debt, or to judgment, the return of the writ on which the debtor was arrested being laid to be in the 25th year (under a *videlicet*), and the writ itself appearing to be returnable in the 24th year, the court held the variance to be fatal, and the plaintiff was nonsuit. 1 T. R. 656. So when a plaintiff in his replication pleaded an appearance to a *clausum fregit* sued out of the Common Pleas, evidence of an appearance to a *clausum fregit* issued out of Chancery was holden not to support the replication. 2 New Rep. 463. And see 2 Camp. 193. In an action for an amercement, where the declaration stated the court to have been holden before the steward of the manor, but it appeared to have been holden before the deputy steward, the court held the variance to be fatal. 1 H. Bl. 162. And see 2 Camp. 270. 193, 87. 7 Taunt. 399. But where in pleading a bill of Middlesex, only a few of the first words were stated, and then an &c. added, this was holden to be no variance from the bill of Middlesex produced in evidence. 1 T. R. 287, n. So, in an action for maliciously holding to bail, where a judgment of *non pros* in the former action was stated thus: "And it was thereupon considered that the then plaintiffs should take nothing by their writ, but that they and their pledges to prosecute should be in mercy, &c." but in the record pro-

duced the words "and their pledges to prosecute" were omitted, and an "&c." substituted; it was holden to be no variance. 13 East, 547. So, in an action for a false return, where the declaration set forth a *fiery facias*, and a warrant to levy so much which the plaintiff had recovered against A.; and the warrant produced was, to levy of the goods of A. so much, which the plaintiff had recovered against ——— (omitting the name), the court held it to be no variance. 2 Str. 909, see 1 Camp. 15. So in pleading an original writ returnable *coram domino rege ubicunque* &c., the omission of *ubicunque* was holden not to be fatal. 1 T. R. 240, n. So, in pleading a *fiery facias*, where it was stated that the sheriff was commanded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining the debt, and by the writ produced it appeared that the 80s. were awarded to J. S. as well for his damages sustained by reason of detaining the debt, as for his costs &c.; this was holden no variance, for costs (in the legal sense of the word) are included in the word damages. 9 East, 198. Where in an action for the escape of a person named *Donner*, the declaration stated the *latitat* to have been against *Donner* and *J. Doe*, and the writ produced was against *Donner* and two others, and not against *J. Doe*, Lord Mansfield held it to be sufficient, the writ being sufficient to warrant the arrest. 1 T. R. 238, n. See 4 Bing. 278. In an action for bribery, where the declaration stated the precept to have been directed to the mayor only, and the precept produced at the trial was directed to the mayor and burgesses, it was holden sufficient. 1 T. R. 239, n. So where the precept declared on was to the bailiffs and jurats, and the precept proved was to the bailiff (in the singular number) and jurats, it was holden good. 2 H. Bl. 113.

In actions *ex delicto*, the rule is not by any means so strict as in actions *ex contractu*. In the latter, a contract being an entire thing, the whole cause of action stated must be proved as laid, except such parts as may be rejected as surplusage, within the rules already laid down: in the former, many circumstances of aggravation &c. are usually laid, which do not probably accord with the truth of the case, and need not be proved at the trial; and, even, as to the cause of action, if only a part of that which is laid be proved, and the part so proved be of itself a sufficient cause of action, the residue not proved shall not hurt. Thus, in an action for disturbance of a right of common, which the plaintiff in his declaration claimed by reason of his possession of a *messuage* and land, and it appeared at the trial that he had land only, and no *messuage*, the court held it to be sufficient to entitle him to damages *pro tanto*. 2 Barn. & Ald. 360. See 1 Id. 706. So, in case for a false return to a *fi. fa.* against A. and B., where it was averred that A. and B.

had goods within the bailiwick, and it appeared in evidence that B. alone had goods there, the court held this sufficient to support the allegation. 4 M. & S. 349. So, where the declaration alleged that the defendant maliciously caused the plaintiff to be arrested for 40*l.* and detained him *until he found bail*; and it appeared at the trial that the plaintiff had not found bail, but had deposited the money with the sheriff: Lord Ellenborough held that as the plaintiff had been detained, the action was maintainable, although the allegations of his having found bail were not proved. 1 Stark. 48. But a part of the facts laid, sufficient to constitute a cause of action, must be proved as laid: therefore, in case for maliciously causing plaintiff to be arrested on a charge of felony, where the declaration alleged that the defendant charged the plaintiff with felony before the magistrate, but it appeared in evidence that the charge was of a tortious conversion of goods not amounting to felony; the variance was holden to be fatal. 1 Stark. 67. So, in actions for verbal slander, the words, or so much of them as will constitute a cause of action, must be proved as laid. See 2 Barn. & Ald. 756. 7 Taunt. 205. 4 Bing. 261. 6 Id. 481. So, in an action for worrying the plaintiff's sheep, where the declaration alleged that the defendant's dog was accustomed to worry and bite sheep and lambs, and the evidence was that the dog was **ferocious* and mischievous, and had frequently attacked men; the court held that the evidence did not support the declaration. 1 Barn. & Ald. 620. Where the declaration stated that the defendant went before one R. C. Baron Waterpark of Waterfork, and charged the plaintiff with felony; and the evidence was that he went before R. C. Baron Waterpark of Waterpark: it was holden a fatal variance; for this was a description of a name of dignity, and the evidence therefore disproved the allegation that he went before the person mentioned in the declaration. 2 Barn. & Ald. 756. So, if a public officer bring an action for an injury done to him whilst in the execution of his office, and he misdescribe his office in the declaration, he shall be nonsuit. 1 Camp. 231. So, if in trespass, case or other possessory action, the plaintiff, instead of declaring on his possession, set out his title (although unnecessary to do so), and fail in the proof of it as laid, he shall be nonsuit. See ante, p. 93. See also 1 Camp. 320. 3 M. & S. 169.

Variances, however, are now in many cases remedied by two recent statutes: By stat. 9 Geo. 4, c. 15, reciting that great expense is often incurred, and delay and failure of justice takes place, by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any

case be amended at the trial, and in some cases cannot be amended at any time, it is enacted "That it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick upon Tweed and Ireland, if such court or judge shall see fit so to do, to cause the record, on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting fourth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such court or judge shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be endorsed on the postea, and returned together with record; and thereupon the papers, rolls, and other records of the court, from which such record issued, shall be amended accordingly."

Where a bill of exchange was stated in the declaration to be drawn by J. S. to his own order, but when produced in evidence it appeared to be drawn in favor of another person, the judge ordered the record to be amended, and the court afterwards held that he had done rightly. *Parks v. Edg.* 1 Crompt. & M. 429.

And by stat. 3 & 4 W. 4, c. 42, s. 23, reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the record or setting forth on the record or document on which the trial is to be had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the *merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter of writing or in print produced in evidence and the record; and that it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause; it is therefore enacted, "that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ or document on which any trial may be pending before any such court or judge, in any civil action or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof, and the recital or setting forth on the record, writ or document on which the trial is proceeding, of any contract, custom, prescrip-

tion, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings where it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at *nisi prius* or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party, who is dissatisfied with the decision of such judge at *nisi prius*, sheriff or other officer, respecting his allowance of such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

*In real and mixed actions, formerly, (with the exception of ejectment), the title must have been proved as laid. In ejectment, no title which is traversable is laid in the declaration, and in fact the cause of action stated is wholly a fiction; but the title of the lessor of the plaintiff must be proved at the trial.

As to the effect of a *scilicet* or *videlicet*, it has been already in part

noticed. It is used to particularize that which was before stated generally, and to explain that which is indifferent, doubtful or obscure; and the matter which immediately follows, it, if it be consistent with that which precedes it, is material and may be traversed; and, if traversed, must be proved. 2 Saund. 291 a. But if the matter after a *scilicet* be not essential to the declaration, and be either impossible, or repugnant, or inconsistent with what has preceded it, it may be rejected as surplusage; ante, p. 99. 100. 101; unless indeed it shew that the plaintiff has no right to what he seeks to recover by the action. Ante, p. 99. If, however, such matter be material (however inconsistent it may be with what has preceded it) it cannot be rejected as a surplusage but must be proved as laid. Ante, p. 101. On the other hand, the want of a *scilicet* or *videlicet* will in some cases make an averment material, which would not otherwise be so: it being a settled distinction, that where any thing which is not material, is laid under a *videlicet*, the party is not concluded by it; but it is otherwise where there is no *videlicet*. 3 T. R. 68. Thus, where the declaration stated that in consideration that the plaintiff would buy of the defendant 45 sheep for 54*l.* 11*s.* 6*d.*, the defendant undertook and promised that they were sound; and the plaintiff proved the price to be 54*l.* 12*s.* 6*d.*; the variance was holden fatal, the sum not having been laid under a *videlicet*. 3 T. R. 67. cit. see ante, p. 116. Therefore if you do not mean to be concluded by the precise sum or day stated (in cases where the precise sum or day need not be alleged), you should plead it under a *videlicet*; as thus: afterwards, to wit, on the 22nd day of November, in the year" &c.; "a large sum of money, to wit, the sum of ———" &c..

The statement of the cause of action in the declaration, should not only correspond with the evidence intended to support it, as above-mentioned, but, in bailable actions, care should be taken that it correspond also with the affidavit to hold to bail, 7 T. R. 80. 2 Saund. 72 a., and with the writ upon which the party has been arrested, 2 H. Bl. 278. 5 T. R. 402. 7 T. R. 80. 2 Saund. 72 a. and see 1 Arch. Pr. C. B. [18, 19, 39, 40.] 51, 99, 277, 291. Doct. Pl. 241, 242, 384, otherwise the bail will be exonerated, or the defendant (if in custody) discharged upon filing common bail &c. See also Bac. Abr. Pleas &c. B. 4. Com. Dig. Pleader, W. 2, C. 13, 14. 1 Saund. 318 a.

Where the writ was in "trespass," indorsed for a debt of £11, and the declaration was in "trespass on the case on promises:" the court, upon application, set aside both the writ and declaration. *Edwards v. Dignam*, 4 Tyr. 213.

Estate, how pleaded.] A seisin in fee is thus pleaded: if of things manurable, such as lands, tenements, rents &c.—that the party was

"*seised in his demesne as of fee*" of and in &c.; Lit. s. 10.; if of things not manurable, such as an advowson &c.—that he was "*seised as of fee and right*," omitting the words "in his demesne." Id. Com. Dig. Pleader, C. 35. In describing a conveyance in fee, the estate must be stated to have been thereby conveyed to the party *and "*his heirs*," to hold to him and to his heirs and assigns for ever. See 2 Saund 11. If a man plead that he or another is seised of a manor, he ought to allege the name of the manor; for it is not sufficient to say that he is seised of a manor in such a parish. R. 2 Lev. 178. Com. Dig. Copyhold, Q. 7.

A seisin in tail is pleaded thus: that the party was "*seised in his demesne as of fee tail, to wit, to him and to the heirs of his body lawfully issuing*," or as the tail is, whether general or special; or if the party be not the original donee, then it must be stated thus, "*seised in his demesne as of fee tail, to wit, to him and to the heirs lawfully issuing of the bodies of G. C. and A. his wife*" (the original donees). If the hereditament to be not manurable, as above-mentioned, the words "in his demesne" must be omitted.

A seisin for life is thus pleaded: that the party was "*seised in his demesne as of freehold for the term of his natural life*" of and in &c.; Co. Lit. 42 a. 1 Saund. 231; or "*for the term of the natural life of J. S.*," where it is an estate *pur auter vie*. A conveyance for life is stated to be for and during the term of the party's natural life; or if *pur auter vie*, then "to him and his heirs and assigns," or "to him, his executors, &c." (as in the deed) "for and during the term of the natural life of J. S." A seisin by the curtesy is pleaded thus: that the party was seised of &c. "in his demesne as of freehold for the term of his life, as tenant thereof by the law of England." See 1 Saund. 256. And as to the acquirement of this estate, it is pleaded by shewing the seisin of the husband and wife in right of the wife, the birth of issue capable of inheriting, and the death of the wife in the life-time of the husband. See the form, 1 Saund. 255, 256. As to the seisin in dower, see Levinz. Ent. 80. If a plaintiff claim under a person, who has only a particular estate, as for life, he must aver the continuance of the estate. Pl. Com. 431 a. Cro. El. 18. [1 Lutw. 357.] So, he who claims under a tenant *pur auter vie*, must aver the life of *cestui que vie*. Mo. 306, 335. Pl. Com. 31 a. [Bro. Estate 18. Plead. 24. Co. Lit. 303 b. Hardr. 80, 82.] So, if the defendant avow for rent on a lease for years, if three persons so long live, he ought to aver that at least one of them is alive; R. 2 Mod. 93. 1 Mod. 217; and the same, upon a lease for years, if the lessee so long live. R. Dal. 101. Com. Dig. Pleader, C. 66. But in these cases an express averment is not necessary; if the continuance of the estate for life appear from neces-

sary implication, it will be sufficient. As in ejectment for a rectory, if it be found that the rector *fuit est adhuc est seisisus*, it is a sufficient averment of his life. Dy. 304 a. R. 2 Jon. 227. So in ejectment on a lease for years if the lessor so long live, *quod ejecit termino nondum finito* is a sufficient averment of the life of the lessor; for the term would have been ended by his death. R. per 3 J. and aff in error, 2 Cro. 622. So, in an avowry in right of a tenant for life, that the plaintiff *est et tempore quo fuit infra feodum*, is a sufficient averment of his life. R. 2 Cro. 637. So if the plaintiff, who claims as lessee for years from a tenant for life, say *virtute cujus fuit et adhuc est possessionatus*, it is a sufficient averment of the life of the tenant for life. R. 2 Bulst. 263. D. 1 Leon. 281. 1 Brownl. 4. In ejectment on the demise of B., if a special verdict find that B. was alive, it shall be intended that he continued in life, if the contrary do not *appear. R. 2 Cro. 146. So, consuance as balliff of husband and wife, seised in right of the wife who was tenant for life, for rent *aretro existente*, is a sufficient averment of the life of the wife, on a general demurrer, R. 2 Lev. 88. 2 Lutw. 1226, or, it seems, even on a special demurrer. Per 2 J. Hale doubted, 2 Lev. 88. Com. Dig. Plead. C. 67. But by st. 21 Jac. 1 c. 13, s. 2, after a verdict in any court of record, the judgment thereupon shall not be stayed or reversed for lack of any averment of the life of any person so as upon examination the said person is proved to be in life. And by st. 4 Ann c. 16, s. 2, this is now extended to judgments by confession, *nil dicit, non sum informatus*, or upon writ of inquiry of damages executed.

It is only the continuance of a particular estate, however, which must be averred, as above mentioned; and therefore the continuance of an estate of inheritance need not be averred, for it shall be intended to continue, if the contrary do not appear. Therefore if a man claim under husband and wife, seised in fee in right of the wife, he need not aver the life of the wife. R. Pl. Com. 431 a. And the same if he plead a conveyance by a tenant in fee. R. Lutw. 357. So, if he claim under a bishop, dean &c. he need not aver the life of the bishop, dean, &c. Pl. Com. 431 a., even although the lease by the bishop was not confirmed, and so determines by his death. Per Dy. Pl. Com. 264 a. So, if he claim by descent from tenant in fee, his estate shall be intended continuing until his death. R. 2 Lutw. 1172. So, if he claim by a lease for years from husband and wife, who was tenant in tail, he need not aver the life of the wife; for she has the inheritance, and her husband is seized in her right. R. Pl. Com. 431. acc. Lutw. 357, 1226. It was ruled, however, Cro. El. 407, that a verdict ought to find the

life of the tenant in tail; [and see Bro. Plead. 24. Estates, 18. Co. Lit. 303 b. 362 b. acc; yet it seems to be the better opinion that the life of tenant in tail need not be averred in any case. 1 Saund. 235 b.] So, if he claim by lease from husband and wife, seised for their lives, and to the heirs of the husband. R. Cro. El. 112. So, if a man make title in assise to a rent charge, against the feoffee of tenant in tail he need not aver the life of the tenant in tail; for the estate of the feoffee continues till the discontinuance is avoided. R. Cro. El. 226. So, if he plead that it was the freehold of A., who demised &c., he need not aver the life of A., for he shall be intended to have the fee. R. Cro. El. 87. So, if an estate be granted to A. and his heirs, till B. attain such an age: he who claims under A. need not aver the life of B.; for the estate of A. (which is a base fee) shall be intended to have continuance, until the contrary appears. R. 1 Leon. 281. If a lease by A. tenant for life, and B. reversioner, be pleaded, there is no need to aver the life of A. R. 1 Leon. 177. Cro. El. 154. So, if a man plead an extent by *elegit*, he need not aver the continuance of his estate; for it shall be intended to continue, unless it appear by record that the extent has been satisfied. R. Hardr. 80. If lessee for life assign his estate to A., who leases at will; in trespass by the lessee at will, he ought to aver the life of the lessee for life, but he need not aver the life of A., or the continuance of the will. 2 Leon. 95. So, where the continuance of the estate is not necessary to the action, it need not be averred: as, if a lease be for years, if A. so long live, and contain a covenant that the lessor has power to lease; in an action for a breach of that covenant, the life of A. need not be averred; for covenant lies, though he be dead. R. 9 Co. 60 b. Com. Dig. Pleader, C. 68.

Where the possession is for a term of years, you must state that the party was "possessed;" Co. Lit. 17 a.; "interested" in the term, would be bad. R. 1 Show. 100. Com. Dig. Pleader, C. 35. To this is added the number of years the lease &c. has to run, either by way of reference, as "for the term of years last aforesaid," or thus "to wit, for the residue of a certain term of years, whereof ten years and upwards were then to come and unexpired;" in debt for rent by an executor, on a lease for years by his testator, where the declaration stated that the testator was possessed for years, and demised the premises to the defendant for a less term, it was holden that he ought to shew the commencement of the testator's term, and that his lessor was seized of such an estate that he could make such a lease. R. 1 Brownl. 48. [Qu.] Cont. 2 Salk. 562. Com. Dig. Pleader, C. 36. But where a lease is made to commence *in futuro*, and in all other cases where the lessee has not entered, the *interesse termini* is stated thus: that the party "was

possessed of the interest" of the said term, to commence &c. or expectant &c.

A tenancy at will, or from year to year, is sufficiently expressed by saying that the party was "possessed:" the latter however must be shewn to have been by demise; the former, by demise, or as a copyhold, or tenancy by sufferance. Bro. Plead. 85.

The seisin &c. of copyhold lands, is stated in the same manner as in other cases, with the addition of these words: "at the will of the lord, according to the custom of the said manor." But if a grant &c. be not previously stated, so as to be referred to, it will be necessary to allege, either before or after the statement of the seisin &c. that the lands are copyhold, that is, that they are parcel of the manor and customary tenements thereof, demised and demisable by copy of court roll, by the lord or his steward. See the form, 1 Saund. 348. (n. 8.) The words "at the will of the lord," are essential, and the omission of them fatal upon demurrer, 2 Lutw. 1166, 1171. Semb. Cro. Car. 229. R. 1 Lutw. 126, but cured by verdict. 1 Salk. 365. So, copyhold must be pleaded to have been demised and demisable by copy of court-roll, time out of mind, or it cannot be adjudged copyhold. 2 Wils. 125. And it must be stated, whether demisable in fee, or for life, &c. Sav. 131. [but see 2 Saund. 326. 1 Id. 348. (n. 8.) cont.] So, where a man entitles himself to a copyhold, he should in pleading shew a grant to him by the lord. Cro. Car. 190. Or if he entitle himself under A., he ought to shew a grant to A. R. 2 Cro. 103. R. Cro. Car. 190. But this is only form, and aided upon a general demurrer. Per 3 J., Cro. Car. 190. Semb. cont. 2 Cro. 103. And if he entitle himself to the reversion after the death of A., it is sufficient to shew a grant of the reversion, without shewing a grant of the estate to A. R. 2 Cro. 52. He cannot however plead that the lands are copyhold, and descendible to the heir, for that is a contradiction; R. upon special demurrer, 2 Lutw. 1328; or that A. was seised in fee, *secundum consuetudinem manerii*, without saying, by copy, or the like; R. 3 Bulst. 230; or that the copyhold was granted by the steward, without naming him. Sav. 131. Com. Dig. Copyhold, P. 4. But in a declaration, if it be required to state merely that the plaintiff was seised &c. of copyhold tenements, and being so seised &c. made a lease &c. the seisin is stated as first above mentioned, without saying whether in consequence of a grant, surrender &c.

In stating the seisin of the king, it is necessary to mention in what right he is seised, whether in right of his crown of England, or of his duchy of Lancaster &c. It must also be shewn of what estate he is seised &c.; for he may have a less estate than a fee-simple.

1 Saund. 187. (n. 1.) Latch. 14, 121. See the form 1 Saund. 187.

In stating the seisin of a corporation; if sole, it is necessary to mention in what right; for the party may be seised in his natural right: but this is unnecessary, in the case of corporations aggregate. 1 Leon. 153. 2 Lev. 68. 2 Lutw. 1233. In both cases, however, it must be shewn of what estate the corporation is seised &c. 1 Saund. 187. (n. 1.) Latch. 14, 121. and see post.

In pleading the seisin of a husband in right of his wife, it must be stated that both are seised in right of the wife; for if it be stated that the husband alone is seised, it will be bad, at least upon special demurrer. 1 Doug. 329. 1 Lutw. 1422. 1 Saund. 253. (n. 4.) 2 Id. 283. n. 1. 27 H. 8, 21 b.

As to the statement of the seisin of a remainder-man, the particular estate and the remainder forming but one estate in law, they are stated together, thus: first the seisin or possession of the particular estate, "*the remainder thereof belonging to the said J. S. and his heirs,*" or as the estate in remainder may be. This of course supposes the deed creating the particular estate and remainder, to have been stated in a preceding part of the declaration.

The seisin of a reversioner is stated thus: that the party was "*seised as of fee and right* (or as the estate may be) *of and in the reversion of*" &c. If the reversion be after a term for years, it may be either as above stated, or he may say that he was "*seised in his demesne as of fee*" &c.; for he has the possession of the freehold and might formerly have had an assise. R. Pl. Com. 191 a. Com. Dig. Pleader, C. 35. In pleading the assignment of a reversion, it must be shewn to have been by deed or fine. Cro. Car. 143. 3 Lev. 155. 1 Saund. 234. (n. 3.)

The seisin of joint-tenants is stated in the same manner as in ordinary cases: thus, that A. B. and C. D. were "*seised in their demesne as of fee*" (or as the estate may be) *of and in* &c. The seisin of parceners is stated in the same manner, adding these words "*as daughters and co-heirs of the said E. F.*" 1 Saund. 255. But in stating the seisin of tenants in common, each is separately stated to be seised of an undivided moiety, thus: that A. B. was "*seised in his demesne as of fee*" (as the estate may be) "*of and in one undivided moiety (the whole into two equal moieties to be divided) of and in*" &c.; and that one E. F. was also "*seised in his demesne as of fee of and in the other undivided moiety of and in*" &c.

If the plaintiff allege a title in the defendant, however, he need not shew it precisely; but it is sufficient to state it in general terms: *As in a *scire facias* against the conusee of a statute, who has purchased

part of the lands of the conusor, and sued an extent against the plaintiff who is purchaser of the other part, it is sufficient to say that the defendant *perquisivit sibi et hæridibus virtute cujus &c. fuit possessionatus*, without shewing that the deed was inrolled. R. Mar. pl. 97, 108. Com. Dig. Pleader, C. 42. So, in an action against the assignee of a term, it is sufficient to allege generally "that all the estate, right, title and interest of the said A." (the lessee) "of, in, and to the said demised premises, afterwards to wit on—at—by assignment came to the said defendant." 1 Saund. 112. (n. 1.) 1 Lev. 190. 1 Sid. 299. 3 Lev. 19. 4 T. R. 75. and see Com. Dig. Pleader, E. 24.

Title by descent, how pleaded.] Title by descent is thus pleaded: after stating the seisin of the ancestor, and his death, add, "Whereupon the tenements aforesaid" (or, "the said reversioner of and in" &c. as the case may be) "with the appurtenances descended and came to the said J. S. as son and heir of the said N. S.," or "as eldest son and heir lawfully begotten of the bodies of the said N. and E. his wife," or "to the said A. S. and C. S. as daughters and co-heirs of the said N. S." or as the case may be. It must be stated how the party is heir, whether as son, daughter, brother, cousin &c: thus, that the tenements &c. descended to the said J. S. as brother and heir of the said N. S.; or "as cousin and heir of the said N. S., that is to say, as eldest son and heir of one G. S., who was the only brother of one H. S. who was the father of the said N. S." See 2 Saund. 45 a. 7. (n. 4.) 1 Salk. 355.

Title by prescription or custom how pleaded.] It may be necessary to premise that there is a material distinction between custom and prescription. A custom is properly a local usage, applying generally to a place, and not to any particular person in it; as, that all the inhabitants of the parish of Dale may dance on a certain close, at all times, for their recreation: 1 Lev. 176. 2 Bl. Com. 263: prescription, on the contrary, is merely a personal usage: as, that J. S. and his ancestors, or those whose estate he hath, have used time out of mind to have some certain advantage or privilege. Co. Lit. 113. 2 Bl. Com. 263. and see 6 Co. 60. Hob. 113. Cro. El. 441. Poph. 201. Style, 477. 1 Lev. 176. 3 Lev. 160. 1 Vent. 386. Carth. 192. 4 Mod. 342. 2 Lutw. 1317. Alleging a thing by way of prescription, however, where it ought to be by custom, or the contrary, will be cured by verdict. 1 Lev. 177.

First, as to prescription: It is necessary to mention that nothing but incorporeal hereditaments can be claimed by prescription. Finch. L. 132. Therefore in real actions a man could not make title to land by *que estate*. See Co. Lit. 121 a. So, in trespass as well as in real ac-

tions the plaintiff cannot make title to land by *que estate*, without saying how viz. by feoffment or otherwise. Bro. Que estate 18, 27. So in *quare impedit* the plaintiff cannot make title by *que estate* to the land to which the advowson is appendant. Id. pl. 1. So, in an information for intrusion (in which by the course of the exchequer the intruder must make title against the king, otherwise he shall be dispossessed) the defendant cannot make title to a term by a **que estate*. Dy. 238 b. Com. Dig. Pleader, E. 23. The hereditaments also must be such as can be raised by grant; and therefore it has been holden that a lord of a manor cannot prescribe to raise a tax or toll upon strangers, for such a right could not be raised by grant. 1 Vent. 887. but see 3 Bur. 1402. Also any thing which is to arise by matter of record, such for instance as the royal franchises of deodands, felons' goods, and the like, cannot be prescribed for; because, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title, and therefore must be claimed by grant entered on record: but the franchises of treasure trove, waifs, estrays and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record. Co. L. 114. 2 Bl. C. 265. There is also a distinction between prescribing in a *que estate*, and in a man and his ancestors, as to the matter of the prescription: namely, that nothing but what is incident, appendent or appurtenant to lands, can be prescribed for in a *que estate*; but if a man prescribe in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant, whether appurtenant or in gross. Lit. s. 183. Finch. L. 104. 2 Bl. Com. 266. If he prescribe for a thing which lies in grant, and which does not pass without a deed or fine, he must prescribe in himself and his ancestors, and not by *que estate*; Co. Lit. 121 a.; as for instance, in a prescription for a hundred. Bro. *que estate*, 9. [See Co. Lit. 121 a. 2 Leon. 74.] So, he cannot prescribe by *que estate* for rent, Bro. pl. 16, 23, 24, nor for a common, estovers, &c. Id. pl. 16, unless the rent, common, &c. be appendant to a manor &c. Id. pl. 30. Agreed, 1 Mod. 232. 1 Vent. 139. A corporation, also, cannot prescribe by *que estate*, but only in themselves and their predecessors. D. 2 Cro. 673. [See 2 Vent. 139.] Nor can a lessee for years plead "that he and all those whose estate," &c. 1 Lutw. 81, for he must allege the prescription in him who has the fee. R. 1 Salk. 363. [And see post.] Com. Dig. Pleader, E. 23. But a woman tenant in dower may prescribe that her husband and his ancestors, *que estate* she has in the seignior, were &c., though the husband had a fee and she not. Bro. Que estate, 10.

A prescription also must be for something *in alieno solo*; see 4 T. R. 417, 418, n.; for no man can claim a prescription in his own land. 3 Taunt. 99. And even, if a copyholder claim common or other profit within the manor, he cannot prescribe for it, but must allege it by way of custom. R. 4 Co. 31 b. Cro. El. 390. Moor, 461. 2 Lutw. 1326. R. 6 Co. 60 b. But if on the contrary he allege a *custom* within his manor *quod quilibet tenens customar'* of such a tenement shall have common of estovers in another manor, it is bad; R. Dy. 363 b. 4 Co. 31 b.; for when he claims a profit in *alieno solo*, he must prescribe for it in the name of his lord. R. 4 Co. 31 b. Foiston. Cro. El. 390. Mo. 461. 2 Lutw. 1327. 1 Salk. 170. Com. Dig. Copyhold, P. 4.

Every one who pleads a prescription, should allege it in him who has the inheritance: As, that he is seised in fee, and that he and his ancestors, or he and all those *quorum statum ipse habet* &c.; Co. Lit. 113 b.; or in the case of a corporation, that they and their *predecessors, &c. Id. Therefore where a copyholder prescribes for common, &c. in *alieno solo*, he should prescribe that the lord of the manor, who has the fee, time whereof &c. had common there for him and his tenants. R. 4 Co. 31 b. [So if a tenant for years plead a prescription, he must allege it in the tenant in fee, and not in himself; Fortesc. 340; and the same as to tenant for life or at will, on account of the imbecility of their estates. 4 Co. 31, 32.] So a man cannot allege a prescription for common or other profit in *alieno solo*, in the inhabitants of a town, or of the ancient houses of a town, *ratione residentia*; for the inhabitants perhaps have not the inheritance. R. 6 Co. 60. 2 Cro. 152. 2 Leon. 44. Godb. 97. R. 2 Cro. 446. So, he cannot prescribe that every *paterfamilias* of an ancient house had common &c.; for perhaps he was but tenant for years, at will, by statute staple &c. R. 6 Co. 61 a. So, it is not sufficient to prescribe that every freeman of a corporation had common, but he should prescribe in the corporation. R. 2 Jon. 115. [But see 2 Lev. 253. So he cannot prescribe that A. tenant for life, and B. in remainder, ought to have common; Dub. 1 Leon. 177. Cro. El. 154; or that A., who has a grant to be parker for life, and his predecessors, have time whereof &c. Semb. Dy. 71. So, if it be alleged that A. *et omnes tenuram illam habentes* have used &c., it is not good. Godb. 54. It will be a good prescription however to say *quod tenentes et occupatores* of such a close ought to repair the fences; for "*tenentes*" imports the tenants of the fee. R. 1 Salk. 335, 6. Semb. 2 Cro. 665. [And in modern pleading, it is sufficient in such a case, in a declaration, for the plaintiff to allege that the defendant, as "occupier" of the close, is bound to repair, without stating the particulars of the estate or tenure by means of which he is chargeable: ante, p. 94; although formerly

such pleading, it seems, would be objectionable. See Cro. Jac. 665. Cro. Car. 419. W. Jon. 387. 5 Co. 99, b. 2 Lev. 163.] But inhabitants &c. may prescribe for an easement &c. *in alieno solo*, as for a way &c. 6 Co. 60. 2 Cro. 152. Cro. Car. 419. Semb. [cont.] Cro. El. 180. [441.] So inhabitants may prescribe to have sacraments administered, or for burial in the church-yard; 2 Rol. 264, l. 16; or to be discharged of toll; R. 1 Shew. 257; or for the privilege of dancing in the close of another. R. 1 Lev. 176. So inhabitants may prescribe for a matter of discharge in their own soil: as *in modo decimandi*. 6 Co. 60. 2 Cro. 152. Semb. Hob. 66. R. Hob. 118. R. 3 Lev. 386. If a man claim, by prescription, a thing incident &c. to another, he ought to say that the thing to which &c. *est antiqua*: as if he prescribe *in modo decimandi* to a park, he may say *quod est antiquus parcus*. Hob. 44. And the same, if he allege an usage to put swine into a park, as incident to the office of parker. Dy. 71 b. But if a thing be not directly mentioned as that to which &c. it need not be alleged that it is *antiqua*: as if a man prescribe *in modo decimandi* in so many acres in such a park, it is not necessary to say *quod est antiquus parcus*. R. Hob. 118, 44. So, if there be words tantamount, it is sufficient: as if he say that the defendant diverted a watercourse *a solito et antiquo cursu* to a mill, without saying *quod est antiquum molendinum*, it is sufficient; 3 Lev. 133. 3 Mod. 50: *or if he say *quod cum molendinum fuit ab antiquo erectum*; R. 1 Lev. 273; so, that he stopped a window, *per quam lumen inferri consuevit*. R. 2 Salk. 459. [Semb. cont.] But if the park itself, or office or other thing, be claimed by prescription, it is not sufficient to say *quod est antiquus parcus* &c. but the party must directly prescribe for it. R. 10 Co. 59 b. Hob. 44. see 2 Jon. 227. So regularly he ought to prescribe in an usage; for it is not sufficient to say that every tenant of a manor *potuit et potuisset sursum reddere* &c. T. Raym. 4. 3 Leon. 83. Com. Dig. Prescription H. In prescribing in a *que estate*, also, it must be alleged in the plaintiff or defendant himself, as that the plaintiff and all those *quorum statum habet* &c.; Co. Lit. 121 b.; for if it be alleged in one in a mesne conveyance, it will be bad. Bro. Que estate 6, 19, 49. Semb. Co. L. 121 b. Com. Dig. Pleader. E. 24. See forms of prescribing in a *que estate*, 1 Saund. 25, 221, 348; of prescribing by a corporation, 1 Saund. 340 b. 2 Saund. 2. In declarations, however, in what are termed possessory actions, a title by prescription is never set forth in modern pleading, however necessary it may be to prove it at the trial: thus in an action by a commoner for a disturbance of common, the declaration merely states that he is possessed of certain land, &c., and by reason thereof has a right of common in such a place for his commonable cattle levant and couchant upon his land, and then

states the disturbance ; ante, p. 92 ; and the same in all other similar cases. See ante, p. 92—94.

By stat. 2 & 3 W. 4, c. 71, s. 5, (already noticed, ante, p. 25,) "in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient ; and if the same shall be denied, all and every the matters in this Act mentioned, (see ante, p. 25,) which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation. And that in all pleadings to actions of trespass, and in all other pleadings, wherein, before the passing of this Act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in this Act, (see ante, p. 25,) as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done ; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, (see ante, p. 25,) or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

Secondly, as to title by custom : we have seen (ante, p. 126,) that a custom is properly a local usage, applying generally to a *place, and not to any particular person in it ; as, that all the inhabitants of the parish of Dale may dance on a certain close, at all times, for their recreation. 1 Lev. 176. So, a custom for all the inhabitants of a parish to play "at all kinds of lawful games, sports and pastimes, in a close of A., at all seasonable times of the year, at their free will and pleasure" is good ; but a similar custom "for all persons for the time being, being in the said parish" is bad. 2 H. Bl. 393. And a custom to take a profit in *alieno solo*, is bad ; such a right can only be claimed by prescription. 4 T. R. 417, 418, n. Dy. 363 b. 4 Co. 31 b. But if a copyholder claim a profit within the manor, he must make title to it by custom ; for he cannot prescribe in himself, on account of the baseness of the estate. R. 4 Co. 31 b. Cro. El. 390. Moor, 461. 2 Lutw. 1326. R. 6 Co. 60 b. A freehold tenant of a manor, on the contrary, must make title by prescription in a *que estate*, and not by way of custom, which is for copyholders only. Fortesc. 339. If a copyholder however plead a lease, it is not necessary to allege a custom ; for it

shall be intended to be pursuant to the custom, if the contrary be not shewn on the other side. D. 1 Leon. 100. So he may plead a demise for a year without a license. Co. Ent. 576 a. Win. Ent. 998. But a demise for several years must be pleaded with a licence. Co. Ent. 185 a.

In pleading, either by plaintiff or by defendant, it is not necessary to set forth general customs; or in other words, customs which extend to the whole of the kingdom generally, such as the custom of the realm relating to carriers, common innkeepers &c., the customs of gavelkind and borough-english, and the like; for the court will take notice of them *ex officio*. 22 H. 6, 21, 22. Doct. Pl. 102. Co. Lit. 175. But particular customs, or those which affect the inhabitants of a particular district, parish or place only, (such as the customs of London, 2 Str. 1187, 1 Wils. 8, and the like,) must be stated. Dy. 27 b. 121 b. Doct. Pl. 105. 4 Mod. 241, ante, p. 94. 96. 2 L. Raym. 1134. The custom may be stated thus: "That within the said manor" (or parish &c.) "there is, and for all the time whereof the memory of man is not to the contrary, there was such a custom that" &c. If a copyholder allege a custom, it is more proper to say positively *quod infra manerium talis habet consuetudo* &c.; Semb. 2 Lutw. 1188, 1189; yet *eo quod secundum consuetudinem* &c. has been holden sufficient; R. 2 Lutw. 1190; so "*Quod cum per consuetudinem manerii habere debeat*," has been deemed well enough. R. 1 Salk. 365, after verdict. If copyholders allege a custom within the manor for common &c., it is not necessary to say what estate they have in their tenements; for be it for life, for years or in fee, the common &c. belongs to them for the time. R. 2 Saund. 326. So, it is not necessary to say that the common belongs *ad statum customarium, for ad tenementa sua prædicta spectant*, is sufficient. R. 1 Salk. 366. Com. Dig. Copyhold, P. 4. But an usage should be stated, or appear in substance upon the pleading; and where a custom was laid *quod talis habetur consuetudo quod quilibet inhabitans haberet* &c. the court held it to be bad; for it should be laid by way of fact triable, *viz. tempore cujus contrarium &c. usi fuerunt habere*. *1 Sid. 237. So, that every tenant of a manor *potuit et potuisset sursum reddere* &c. was holden bad. T. Raym. 4. 3 Leon. 83. But although this great particularity in stating a custom is certainly necessary in a plea, the court are not so strict in a declaration; and where a declaration alleged a custom within London, *uti possit* &c. was deemed sufficient. R. T. Raym. 4. Cro. Car. 347. If a man allege a custom in London or other city, he should say *quod est antiqua civitas*; R. Cro. El. 169; if in a town, *antiqua villa*. 10 Co. 59 b. It may be necessary to mention, that a custom cannot be laid in the negative. 2 L.

Raym. 869. Care should be taken to state the custom truly: for any material variance between the custom laid, and that proved, will be fatal. See 3 B. & Ad. 433. 1 Bing. 217. On a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, the custom proved was that the lord should have the best beast or good, and the court held the variance fatal. 4 B. & P. 394, n.

Where a declaration states that by a certain indenture, "it is witnessed," &c., and then sets out the very words of the deed, there is no variance, although the legal effect of the whole deed may be different from that which the part set out imports. *Ross v. Parker*, 1 B. & C. 358. See ante, p. 332.

Title by alienation, how pleaded.] Alienation is neither by deed, by matter of record, or by custom. First then as to alienation by deed. It may be necessary however, before we describe the mode of pleading each species of deed in particular, to premise generally that a deed must be pleaded as it operates in law, and not according to the words of it merely. 1 Vent. 109, and see 9 B. & C. 909. And therefore if the words of the deed are "I give, grant, release and confirm," it must not, in pleading it, be stated that such a one *dedit concessit, relaxavit et confirmavit*, but *quod concessit*, or *quod relaxavit* &c. as the deed operates. 3 Lev. 292. R. 1 Vent. 78. T. Raym. 187. 1 Sid. 452. 2 Saund. 96. [1 Vent. 109. Co. Lit 301 b. 2 Saund 97 b. (n. 2.)] So if a deed operate as a covenant to stand seised, the party pleading it cannot say that for affection *concessit* &c.; R. 3 Lev. 292. 4 Mod. 150. Skin. 315. [Carth. 308. 2 Vent. 149, 260, 266] and though he add "*quæ concessio operavit per viam conventionis stare cesit*" &c. it is not good, for this latter allegation is impertinent; R. 3 Lev. 292; and the same, though he conclude *virtute cujus*, and of the statute of uses he was seised. Cont. per 3 J. But Pollexfen acc. and the judgment of the 3 J. was reversed in B. R. 3 Lev. 292. 2 Vent. 149. 4 Mod. 149. If there be a feoffment by a joint-tenant to his companion, it should be pleaded as a release, (that being the only operative conveyance in such a case), and not as a feoffment or grant. 4 Mod. 150. [Co. Lit 193 b. 200 b. 1 Sid. 452. 2 Saund. 96. 1 Vent. 78. T. Raym. 187.] For the same reason, if tenant for life grant to him in reversion, it should be pleaded as a surrender. 4 Mod. 151. [Comb. 190.] Com. Dig. Pleader, C. 37. So, if a deed be by the words "*dedi et concessi*" &c., yet if it operate as a bargain and sale, it ought to be so pleaded. Cro. El. 166, and see 1 L. Raym. 403, 404. If a man licence another to enjoy a certain house or land until such a time, this amounts to a lease, and may be pleaded as such, or as a licence, at the option of the party pleading it.

Hardr. 366. 2 Lev. 194. So, if an obligee covenant not to sue the obligor, this amounts to a release, and may be pleaded as such; but if he only covenant not to sue him until such a time, it does *not, but is the subject of an action of covenant merely. 1 And. 307. Cro. El. 352. Ro. Abr. 939. See Lit. Rep. 190. Cro. Car. 551. March. 95. Carth. 63, 64. 2 Salk. 573. 1 Show. 46. 1 T. R. 446. 8 T. R. 168.

In pleading a deed, also, it must appear upon the face of the pleading that it was sealed by the party who made it, that is, the sealing must either be expressly averred, see 1 Vent. 136, 137. Allyn, 21. Cro. El. 355, 356. Comyn's Rep. 139, 140. 1 Str. 508. 1 Saund. 291, and n. 1, or the instrument must be named by some word of art, such as "deed," "indenture," or "writing obligatory," which of themselves import that the instrument was sealed by the party. 4 Leon. 175. 2 Ro. Rep. 228. Cro. El. 737. Per Houghton, J. Cro. Jac. 420. 2 Vent. 107. 6 Mod. 306. 1 Str. 412. 2 Str. 815. 2 L. Raym. 1538. But without such averment or words of art, it will be bad; and therefore if for instance it be alleged that J. S. by his "certain writing" demised, or covenanted, or acknowledged &c., without averring that he sealed, the court will not intend the writing to be a deed. Cro. El. 571. 3 Lev. 284. 2 L. Raym. 1537, 1538. A defect in this respect, however, may be aided by the admission of the other party that the writing was sealed; as, where this defect occurred in an action of debt on bond, and the defendant prayed oyer of the "said writing obligatory," and pleaded payment, the court held it to be cured by this admission in the plea that the writing declared upon was a bond. Cro. Car. 209, and see 1 Saund. 291. (n. 1.) Delivery, though essential to a deed, is never averred in pleading, Cro. El. 738. Cro. Jac. 420. 2 L. Raym. 1538. 1 Saund. 291, (n. 1.)

It is also necessary to observe that in pleading deeds, only such parts of them should be set forth as are necessary for the purpose of the party who pleads them, together with such other parts as may qualify those necessary parts, as for instance, such as may contain conditions precedent, or the like. If unnecessary matter be stated, the court, upon the application of the opposite party, would probably order it to be struck out of the pleading, and the party pleading it would have to pay the costs of the application; besides unnecessary recitals of a deed in pleading are extremely dangerous, as being liable to variances and other formal objections. And even as to the parts which are material and necessary, it is not necessary to set them forth in letters and words; but it is sufficient to state merely the substance and legal effect of them. 1 Saund. 238, (n. 2.) It is also not only unnecessary but dangerous to

describe the lands &c. as they are contained in the deed, under a *par-nomen*, as it is called ; see 2 Lutw. 1006. 1 Ro. Rep. 72, 422. Owen, 133. Yelv. 166. 1 Brownl. 145 ; it is better to describe them as " certain premises in the said indenture particularly mentioned and described." So, in stating the term in a demise, where the exact number of years is immaterial, it is sufficient to describe it generally as a demise for a certain term therein mentioned, and still unexpired (if such be the fact), without stating any number of years in certain. And the like in other cases. If there be any variance in substance between the deed itself, and the *statement of it is pleading, the opposite party may have advantage of it at the trial, if the deed be put in issue and the judge refuse to amend ; see ante, p. 119 ; or he may set it forth on oyer, and demur generally. So, if there be any material parts of the deed omitted, which qualify those which are stated, the opposite party may set forth the deed on oyer, and demur. See Saund. 366 (n. 1).

There is another general rule in pleading deeds, which is necessary to be mentioned in this place ; namely, that a man who claims by deed and pleads it, should plead it with a profert *in curia*, that is, should say *hic in curia prolat'*, if he be a party to the deed ; for by shewing of the deed in court, the court are to judge whether it is good. R. 10 Co. 92 a. Co. Lit 35 b. R. 2 Cro. 272. Yelv. 201. [6 Co. 36. Hob. 233. Sty. 459. 2 Salk. 498. 2 L. Raym. 1076. 1 Salk. 76. 6 Mod. 244.] Therefore if a man claim a villain, or any other thing which he cannot have without deed, he ought to shew the deed in court. Lit. s. 183. See 1 Bing. 217. So, if a man allége an estate of freehold to be on condition, he must shew a deed thereof. Lit. s. 365. Com. Dig. Pleader, O. 1. So, in debt on bond, he must shew the bond. So where an action is founded on a deed, he must shew the deed ; as in covenant, &c. But he need not shew to the court a writing not sealed : as if he plead a warrant of a justice of peace, he need not say *hic in curia prolat'.* R. 3 Lev. 205. [Cro. Jac. 372. 1 Ro. Rep. 221.] So, if he plead a sheriff's warrant : D. 3 Lev. 205. 2 Cro. 372 ; or an award, for it is no deed. Sty. 459 ; or a policy of insurance ; 1 Sid. 386 ; [or a bill of exchange or promissory note ; Bunb. 243 ; or a deed operating under the statute of uses ; Dy. 277 a. and notes in marg. Cro. Jac. 217. Cro. Car. 441. Carth. 315. 1 Vez. 394. 3 T. R. 156. 2 H. Bl. 262. 1 Saund. 9 (n. 1) ; or a ffeoffment, for the estate passes by the livery. 3 T. R. 156.] So, though the instrument be under seal, yet if it be not a deed, it need not be shewn ; as for instance, a composition with creditors on the stat. 8 & 9 W. 3, c. 18. R. 4 Mod. 58. Com. Dig. Pleader, O. 3.

Not only parties to a deed, but also every person claiming any

estate or interest by a deed, though he be no party to it, must shew it. 10 Co. 92 a. Co. Lit. 226 a. As, if there be a release of a right to tenant for life or in tail, he in reversion or remainder, who pleads it, must shew the deed; Lit. s. 453; or if it be to him in reversion or remainder, if the tenant for life plead it, he must have it in his hands. Lit. s. 452. So, if a confirmation be to tenant for life, remainder to A., he shall not have waste or other benefit by such remainder, without shewing the deed. Lit. s. 573. So, if the defendant, being a tinner, plead a privilege granted by charter of Edw. 1 to tanners not to be sued out of the stannaries, he ought to shew the patent, for he is privy to it. R. Mo. 849. Com. Dig. Pleader, O. 4. So, though he have only part of the estate which was granted by the original deed, he must shew the deed: as, if an estate be granted by letters-patent, the lessee of part must shew the letters-patent in pleading. R. 10 Co. 92 a. Dub. Dy. 29 h. Semb. cont. 2 Cro. 70. So, if the grantee of a rent grant a part of the rent to another, the second grantee ought to shew the first deed. 3 H. 6, 20, 21. 10 Co. 93 a. Com. Dig. Pleader, O. 5. So, if a man *justify under one who is party or privy to a deed, in pleading he must shew the deed. 10 Co. 92 a. Co. Lit. 226 a. As if he justify as servant to the lessee of a patentee; R. 10 Co. 92 a: 2 Cro. 317; or to a lessee, who by a covenant in his lease has power to take trees for fire bote; R. 2 Cro. 292; or as servant to a lessee of tithes. R. 2 Cro. 360. Com. Dig. Pleader, O. 6, and see 2 Lil. Reg. 202. Sty. 15. And if a deed be necessary, he who pleads it must shew it, though nothing be conveyed or transferred by the deed, but it relates merely to collateral matter: as if a man plead attornment by a corporation to a grant to him in reversion, he must shew the deed of attornment, although he claim nothing from those who attorned, and the attornment be only a consent. 6 Co. 38 b. Com. Dig. Pleader, O. 7. 1 Bulst. 119. Cro. Car. 143.

But if a man be a stranger to the deed, and claim nothing under it, nor justify as a servant to one who is party or privy, he need not shew the deed, though he plead it. 10 Co. 93, 94. As, if he come in, not by the party to the deed, but by act of law, and therefore cannot provide for the shewing of the deed, he need not plead it with a profert: as, if guardian in chivalry in right of the heir enter for a condition broken, he need not shew the deed containing the condition. Co. Lit. 225 b. So, tenant by statute merchant, staple, or elegit; Co. Lit. 225 b. 5 Co. 75 a; so, tenant in dower; Co. Lit. 225 b. [Jenk. 305. Cro. Car. 209; although otherwise as to tenant by the courtesy. Co. Lit. 226 a. 10 Co. 94.] So, the assignee of a debt upon bond by commissioners of bankrupt need not shew the bond; for he comes to

the debt by act of law. R. Cro. Car. 209. [So, where there was an assignment of all debts, with a power of attorney to the assignee to receive and compound for the same, and to submit them to arbitration, and the assignee on an arbitration had a sum awarded to be paid to him; in an action by the assignee for the sum so awarded, where the assignment was of course set forth in the declaration, it was holden not to be necessary to make a profert of it. 8 T. R. 571. Where the grantee of the next presentation was outlawed, and the church became vacant; and the lord of the manor, who was entitled to the goods &c. of persons outlawed, brought a *quare impedit*: it was ruled that the plaintiff, being in *in le post*, and not privy to the grant, was not bound to make a profert of it. Hob. 302.] If a minister sue for an augmentation, on stat. 29 Car. 2, reserved by a dean on a demise by indenture of lands belonging to his deanery, he need not shew the indenture, for it is sufficient to say *Penes se remanen.* R. 3 Lev. 83. A bailiff who justifies under a justice of peace need not shew the commission; 20 H. 7, 7 a; nor need a man who pleads a patent to a stranger shew the patent. R. Hard. 187. So, if *cestui que use* plead a grant of an advowson by a deed to B. to his use, he need not shew the deed, for the deed belongs to B. R. 2 Cro. 217. So, if there be a covenant to stand seised to the use of B., he who claims under B. need not shew the deed of covenant in pleading for B. is in by law, namely, by stat. 28 H. 8, c. 10 of uses. Semb. Cro. Car. 442. [Dy. 277. Cro. Jac. 217. W. Jon. 377. Noy. 145. Carth. 316.] So, an executor of a feoffee need not produce the deed by which the plaintiff enfeoffed B. to the use of *the testator, in debt on a bond for performance of a covenant in the same deed. R. Lutw. 463. Com. Dig. Pleader, O. 8. So, it seems, in all other cases where deeds operating under the statute of uses are pleaded, a profert is unnecessary. Dy. 277 a, and notes in marg. Cro. Jac. 217. Cro. Car. 441. Carth. 315. 1 Vez. 394. 3 T. R. 156. 2 H. Bl. 262. 1 Saund, 9 (n. 1). So, where a person has no right to the possession of the deed or counterpart, as for instance, the owner of a rent-charge, he may plead it without profert. 1 Vez. 394, 397. and see 2 Show. 418. 3 Lev. 83. Moor, 870. Plowd. 149. So, where in replevin the defendant avowed for rent devised to him in mortmain by the custom of London by testament; *Fulthorpe* demanded oyer of the testament; but *per Strange*—it belongs to the executor: as, a feme, who demands dower of a rent granted to her husband, shall not shew the deed, for it belongs to the heir. Bro. Oy. de Rec. 10. To the above rule, namely, that a stranger to a deed is not obliged to plead it with profert, there is, however, this exception: that if the deed belong to him, he must shew it, though he came to the estate by act of law: thus, the lord by escheat

shall not plead a condition to defeat a freehold, without shewing it [because the deed belongs to him]. Co. Lit. 226 a. So, tenant by the courtesy shall not plead a condition made by his wife, without shewing it, though he is in by act of law; for it is presumed that he has the deeds which belonged to his wife. Co. Lit. 226 a. So, if the uncle of tenant in tail enfeoff another with warranty, who afterwards releases the warranty to the feaffor, and the uncle die; if the tenant in tail plead the release, he must shew it, for it belongs to him after the death of his uncle. Co. Lit. 393 a. Com. Dig. Pleader, O. 9.

Secondly, if the estate created by a deed be executed [or determined,] if the deed be pleaded by a person who is neither party nor privy to it, he need not shew it: as, if he plead a feoffment to A. upon condition, and entry for the condition broken, and afterwards a descent to the defendant, he need not shew the deed of condition, for it is executed. Co. Lit. 226 a. So, if he plead a mortgage and payment at the day, he need not shew the deed; for the condition being performed, the deed perhaps was delivered up. Co. Lit. 226 a. So, if a mortgagee demise for years, and the mortgagor re-enter; in debt for rent against the lessee afterwards, he shall plead the mortgage and re-entry without shewing the deed. Co. Lit. 226 a. So, if a confirmation be to a lessee for life, remainder to A.; in waste &c. by A. after the estate executed, he need not shew the deed. Co. Lit. 317 b. So, if the defendant plead an assignment of a lease, and the plaintiff reply that he could not assign without the lessor's licence by deed, and the defendant rejoin that he had licence by deed, he need not shew it, for it is executed. R. 6 Co. 38 b. R. 2 Cro. 102. Com. Dig. Pleader, O. 10. So, the grantee of the next presentation to a church, having presented, need not shew the deed of grant to him, being a matter executed. 1 Ro. Rep. 221, per Coke & Dodderidge. Dy. 29, pl. 194. But a party or privy to a deed must shew it, though the estate be executed: thus, the lessor himself cannot plead a condition and entry for the condition *broken, without shewing the deed, though the condition be executed. Co. Lit. 227, 228 b. Com. Dig. Pleader, O. 11.

Thirdly, if there be a deed, where it was not necessary, whereby no estate or interest is conveyed, a man who pleads it need not shew it to the court: as, if a lease be on condition not to assign without licence and the lessee plead a licence by deed, he need not shew the deed; for there is nothing conveyed by it, and a licence without deed would have been sufficient. R. 6 Co. 38. [1 Bulst. 119. Cro. Car. 143.] So, if the condition be that he will not assign without deed, and he plead an assignment by deed, he need not shew the deed; for a deed was not necessary *ex provisione legis*, but only *ex provisione hominis*. 6 Co. 38

b. So, in debt for rent upon a lease by indenture, it is not necessary [it seems] to shew it; for the lease is the foundation of the action, and it need not be by indenture. Per 2 J. Cro. El. 711. 6 Co. 38 b. in marg. Com. Dig. Pleader, O. 14. But it has been holden that where a thing is conveyed by deed, which would pass without one, if a party plead the deed, and make title thereby, he must plead it with a profert. 2 Mod. 64.

Lastly, if the deed pleaded be only in the inducement to the action or bar, it need not be shewn to the court: [8 T. R. 571. 2 Bulst. 228. Sty. 193. 264. Cro. El. 217. W. Jon. 377. Cro. Jac. 43. 70. Cro. Car. 442. 1 Ro. Rep. 13, 328:] as, in a suit in the Exchequer by the king's farmer, he need not shew the deed whereby he is farmer; for it is collateral to the action. 6 Co. 38 b. So, in an action on the stat. 2 & 3 Ed. 6, c. 13, if the plaintiff declare that the king granted tithes by letters patent to A. for life, who leased to the plaintiff for years, he need not shew to the court the letters-patent, which are only conveyance to the action. R. 2 Cro. 70. So, in an action for disturbance of a way, if the plaintiff declare that a corporation and all *que estate* &c. in such a messuage, have a way, he need not shew the deed whereby the estate was conveyed to the corporation; for it is only inducement. R. 2 Cro. 673. [Palm. 387, and see Cro. Jac. 171. Yelv. 201. Brownl. 220. 2 Mod. 277.] So, in replevin, if the avowant claim by a *que estate* a hundred to which a leet is incident, he need not shew the deed whereby the hundred is claimed, for this is only inducement to the leet. 2 Leon. 74. So, in trespass, if the defendant justify by command of the heir of A., who died seised, and the land descended to his heir; and the plaintiff says that A. by indenture covenanted to stand seised to the use of B. &c., and by his licence &c., and traverses the dying seised: he need not shew the indenture, for it is only inducement to the traverse. R. Cro. Car. 442. W. Jon. 377. Com. Dig. Pleader, O. 15.

As to the form of profert, it is usually thus; after stating that on such a day, by a certain indenture &c., then say, "one part of which said indenture" (or "which said writing obligatory") "sealed with the seal of the said J. S., the said J. N. now brings here into court, the date whereof is the day and year aforesaid." The profert should be of the original deed itself, and not merely of a confirmation of it; Bro. Monstrans, 134; nor is profert even of a counterpart, it seems, sufficient. Noy. 53, see 3 T. R. 153, n. but see 3 B. & Ad. 296. It is not necessary, however, to state in it the names of the witnesses to the deed. Fortesc. 366. And in an action on a bond conditioned for the performance of covenants in another deed, it is sufficient to make profert of the bond, and not of the other deed; it is the duty of the defendant to

make profert of the deed containing the covenants. 1 Saund. 8, 9, 6 Mod. 237, per cur.

If one party however detain the deed, the other may plead it without shewing it. [3 T. R. 153:] thus, tenant in assise may plead a feoffment on condition and entry, and that the plaintiff entered and took the chest where the deed was kept, and detains it, without shewing the deed. Co. Lit. 226 a. So, in waste, the defendant may plead a release, and that the plaintiff got possession of it and detains it, without shewing the release. 5 Co. 75 a. So, the plaintiff may declare that by indenture, which the defendant *penes se retinet*, A. demised the rectory to the defendant, who thereby covenanted to find a priest and to pay him 20*l.* per ann., and that the plaintiff was found, and now brings debt for the 20*l.* without a *profert in cur'*; for neither the indenture nor counterpart belong to him. R. 3 Lev. 83. Com. Dig. Pleader, O. 12. So, if a deed be shewn in court and denied, for which reason it remains in court, it may be pleaded in another court without shewing it. 5 Co. 74 b. Com. Dig. Pleader, O. 13. So, it has been holden to be a sufficient reason to dispense with the necessity of profert, to state that the deed which is pleaded has been lost by time and accident, or by any other casualty, as by fire &c.; 3 T. R. 151. 153 n.; or that it has been destroyed by the opposite party. 3 T. R. 153 n. See 2 Str. 1186. 1 Wils. 16. And where, in setting forth a conveyance, it was stated that a release was cancelled "by the seal of the releasor being taken off and destroyed or lost," with a profert of the residue of the deed, the court of C. P. held this to be good pleading. 2 H. Bl. 259. But where a defendant in trespass pleaded, by way of justification, that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not proffered in court, "of which the date and names of the parties are unknown," the court held this to be bad. 10 East, 55. If instead of pleading an excuse for profert, the deed be inadvertently pleaded with profert, the opposite party will be entitled to oyer; 3 T. R. 153 n.; and nothing but the production of the deed will suffice. 4 East, 585. But in such a case, the party pleading may have leave to amend, by inserting the excuse for profert. 1 Saund. 9 a. 3 T. R. 153 n. and see 1 Wils. 16.

Want of profert was formerly error; it was afterwards aided after verdict by stat. 16 & 17 C. 2, c. 8; and now, by stat. 4 Ann. c. 16, it is aided, unless advantage be taken of it by special demurrer. Lutw. 1355. Com. Dig. Pleader, O. 17.

Where a judgment of any of the superior courts is pleaded, it must be pleaded with a *prout patet per recordum*, and not with a profert,

for it is in the custody of the court and not of the party. See *Comm. Dig. Pleader*, E. 29. And the same of records of inferior courts, for the same reason. 11 H. 4, 12, 13. Bro. Oyer, 8. 5 Co. 75 a. Co. Lit. 231 b. So, a recognizance is pleaded with a **prout patet per recordum* merely. And where a judgment is only matter of inducement, even the *prout patet* may be omitted; as in an action on the case for an escape upon a *capias utlagatum*, in the recital of the outlawry in the declaration, it need not be averred with a *prout patet per recordum*; *Lutw.* 111. R. 5 Mod. 9, 10; although some precedents do it. *Lutw.* 111. So, in escape after commitment in execution on a judgment, it will be good without such averment. R. on gen. demurrer, 2 Salk. 565. *Comm. Dig. Pleader*, C. 82. And even if the *prout patet* be omitted, where it is requisite, the omission is now, by st. 4 Ann. c. 16, aided, unless advantage be taken of it by special demurrer.

If letters-patent be pleaded in the same court in which they are of record, they need not be pleaded with a *profert*; 5 Co. 74 b. 2 Salk. 497; but if inrolled in another court, they must be pleaded with a *profert* either of the letters-patent themselves, or of an exemplification thereof. 2 Salk. 497. *Comm. Dig. Pleader*, O. 13. st. 3 & 4 Ed. 6, c. 4. explained by 13 El. c. 6. 10 Co. 88. 92. Moor, 849. Dy. 29 b. 1 Saund. 189, but see 1 T. R. 149. A bargain and sale inrolled also, though *quasi* a matter of record, must be pleaded with a *profert* either of the deed itself, 5 Co. 74 b., or of a copy of the inrolment. 10 Ann. c. 18.

Having thus treated of the pleading of deeds generally, we shall now notice some peculiarities in the pleading of particular deeds.

A feoffment is never pleaded by deed; but the pleading merely states that J. S. on such a day enfeoffed J. N. of the said tenements &c., to have and to hold &c.; consequently a *profert* is unnecessary; 2 Saund. 10. (n. 13.); nor is it necessary to plead livery or attornment; Co. Lit. 303. Yelv. 135. Plowd. 149, 150. Doug. 283. 10 E. 3, 45. Doct. Pl. 48, and see 3 T. R. 156. 1 Saund. 6 a; indeed attornment need not be pleaded in any case. Doug. 283. 4 Ann. c. 16, s. 9, 10. 11 G. 2, c. 19, s. 11.

The best way of declaring upon a lease, is to set forth that part of it only which is necessary to entitle the plaintiff to recover, and to state no more of the covenants than those on which breaches are assigned. See ante, p. 132. Therefore in an action of covenant for non-payment of rent, it is sufficient to allege in the declaration that the plaintiff, on such a day and year, at such a place, by a certain indenture made between him of the one part and the defendant of the other part (which the plaintiff brings here into court) demised to the defendant "certain

premises particularly mentioned and described in the said indenture," (instead of setting out the parcels, as is too frequently done, and which is not only unnecessary but extremely dangerous,) "except as therein is excepted," to hold the same to the defendant, except &c., for a certain term therein mentioned and still unexpired, yielding the rent of ———payable on &c.; and then state the covenant for non-payment of rent, the entry of the defendant, and the breach in not paying so much rent due. Or, if the action be for the breach of any other covenants, the plaintiff need only state "at a certain rent payable by the defendant to the plaintiff, as in the said indenture is mentioned," and then set out the covenants on which the action is brought, and the breach of them. Cowp. 665, 727. 1 Saund. 233.(n. 2.) If the lease be a lease for years, it is not *necessary (though usual) to state any entry or occupation by the lessee; for though he neither enter nor occupy, he must pay the rent, it being due by the lease or contract, and not by the occupation. 1 Salk. 209, and see Doug. 455. But in debt for rent upon a lease at will, it is otherwise; for the rent is only due in respect of the occupation. 1 Salk. 209. The time of entry, also, is often inserted, but unnecessarily; for *veritate cujus intravit*, generally, has been holden sufficient without shewing the time; Cro. Jac. 549. Latch. 196. and see Cro. El. 169. Doug. 461, n.; and so are many entries. Clift. 231. pl. 5, 232. pl. 6, 235. pl. 8. Lib. pl. 114. pl. 11. 117. pl. 23. 118. pl. 27. 1 Saund. 203. (n. 1.) Where the plaintiff declares upon a demise by himself, he is not obliged to set out any title to the lands &c. demised, but may begin his declaration with stating that "Whereas by a certain indenture &c. he demised" &c.; 1 Str. 230, 231. Carth. 32. Lib. Pl. 97. Lil. Ent. 130, 141; but in an action by an assignee of the reversion, he must set out the title of the lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff. Clift. Ent. 213, pl. 7. Lil. Ent. 132. 135. 1 Saund. 231, 233. (n. 2.) see ante, p. 84.

A surrender is either in deed, or by operation of law. A surrender in deed must be pleaded by the the words *surreaum reddidit*, (which alone in pleading describes the operation of a conveyance as a surrender), Crd. Car. 101. 4 Mod. 151, whatever the operative words of the conveyance may be. And therefore if a lessee for life or years grant or release or discharge to his lessor, all his right, title and estate in or to such land, it is holden to amount to a surrender, and must be pleaded as such. 2 Ro. Abr. 497. pl. 15, 497, 498. H. pl. 1. 2 Wils. 26, 27. 4 Mod. 151. And the same as to surrenders by operation of law: as if a surrender be by acceptance of a new lease, it is not good to say that the lessee being possessed by a former lease, the lessor demised to

him; but that the lessee surrendered and then the lessor demised to him, or that the lessor entered and demised. *Semb. per Dy. Pl. Com.*, 194 b. So, regularly, [in surrenders in deed] he ought to shew that the lessor assented to it, where the other party pleads or brings an action in disaffirmance of the surrender; 2 Vent. 207; but the omission will be aided after verdict; and it is not of necessity. *Semb. 2 Vent. 207. [2 Vent. 198. 2 Salk. 618.] Com. Dig. Surrender, N.* It is not necessary however to state that the lessor entered after agreeing to the surrender, for it shall be intended. *Cro. Car.* 101. 2 Saund. 305 b. See the form of pleading a surrender, 1 Saund. 235 c. 2 Saund. 22.

An assignment of a term, when pleaded by any person who was a party or privy to it, is (if by deed) usually pleaded as other deeds; see the form 1 Saund. 56. 2 Saund. 21; or if by a mere note in writing, it may be pleaded in like manner, but without reference to the writing; see the form, 2 Saund. 418; and indeed in neither case is it necessary to state the assignment to be by deed or writing, although it must appear in evidence to be so. 1 Saund. 234 (n. 3.) ante, p. 95. But when pleaded by a person who was not a party or privy to it, as by the lessor or assignee of the reversion, it is sufficient to state it in a general manner, thus: that "All the estate, *right title and interest of the said A." (the lessee) "of, in, and to the said demised premises, afterwards, to wit, on &c. aforesaid, by assignment came to the said J. S.;" and this form will answer, although there may have been several mesne assignments.

In pleading a covenant to stand seised to uses, it must be stated to have been made in consideration of either natural love and affection (stating the relationship between the covenantor and the covenantee) or marriage; and that the covenantor thereby covenanted that he and his heirs would from thenceforth stand seised of the premises in question with their appurtenances, to the use of the covenantee, his heirs &c. As has been before mentioned (ante, p. 131,) it is little matter whether the words of the deed accord with this form of pleading; if the deed operate as a covenant to stand seised, it must be pleaded in the manner now directed. 2 Saund. 96 b. (n. 1), 97. 1 Saund. 230 c.

A bargain and sale is pleaded, regularly, thus: that such a one, by indenture of such a date, between such and such, *debito modo* in such a court, *infra sex menses tunc proximos sequentes irrotulat secundum formam statuti &c. pro quadam pecunie summa, bargainavit et vendidit &c.* 2 Saund. 11, 12. [And see the precedents, 1 Saund. 256. 2 Saund. 275.] Although the deed be by the words "*dedi et concessi*," yet if it operate as a bargain and sale, it should be so pleaded. *R. Cro. El.* 166, [see ante, p. 131.] If it be said that such a one, by indenture, *bargainavit et ven-*

~~edit~~, it is good, though "*pro quadam pecunia summa*" be omitted; R. acc. Dy. 90 b. in marg. Moor, 504. 1 Leon. 170. Dub. Dy. 90 b. T. Raym. 201. 1 Lev. 308. Semb. Cont. Moor, 570; or, at least, if bad upon demurrer, yet it would be good after verdict. R. 1 Lev. 308. R. 1 Vent. 109. [Omitting to state that the deed was made for a pecuniary or other valuable consideration, or stating it to have been made "for the considerations therein mentioned," generally, has since been holden bad upon demurrer, although it would be cured by verdict, or by taking issue on a collateral fact; 2 Str. 1228. 1 Wils. 91; and in a late case upon the subject, it was holden that the only way of taking advantage of it is by special demurrer. 2 H. Bl. 261.] If a bargain and sale be pleaded, without alleging in what court it was inrolled, it will be bad; R. Yelv. 213; and "*juxta formam statuti*" does not supply it 2 Cro. 291. So, if it be said "*debite modo inrotulat*," in such a court without saying "*secundum formam statuti*" or "within six months," it will be bad; R. after verdict, Alleyn, 19. [Sty. 34.] Semb. Cart. 321; but if "*secundum formam statuti*," be added without saying "within six months," it is sufficient. Semb. 2 Saund. 11. So, if it be said "*debite modo inrotulat*" in such a court, within six months, it is good, although "*secundum formam statuti*" be omitted. Semb. 2 Saund. 12. Com. Dig. Barg. and Sale, B. 12. What is mentioned here, as to inrollment, must of course be holden to extend only to conveyances of freehold estates, and not to a bargain and sale for a term of years.

A lease and release, when a conveyance under the statute of uses, is pleaded thus: you first state a bargain and sale for a year; "by virtue of which said indenture, and by force of the statute made for transferring uses into possession," the bargainee became possessed of *the tenements for the term; and being so possessed, and the bargainor being seized of the reversion,—you then state the release of the reversion to the bargainee. See the form 2 Saund. 10, 11., and notes 15, 16. It is usual, after stating the release, and after the words "by virtue of which said release," to add "*and by force of the statute for transferring uses into possession*" the bargainee became seized &c.; but these words in italics seem to be not only unnecessary, but improper; for the release is in fact a conveyance at common law, and not a conveyance operating under the statute of uses.

A lease and release, when a common law conveyance, is pleaded thus: you first state the lease for a year; next, that the lessee entered and was possessed, (which it is essential to state; for until the lessee have entered, he is not capable of a release): and that, being so possessed, and the lessor seized of the reversion, the lessor released the reversion to the lessee. See the form, 2 Saund. 277.

As to letters-patent or grants from the crown, in pleading them, it is in the first place necessary to shew of what estate the king was seised at the time of the grant; for the king may be seised of a less estate than a fee simple. Latch. 14. 121. 1 Saund. 187 (n. 1). It must also be shewn *quo jure* the king was seised, (whether in right of his crown, duchy of Lancaster &c.) and under what seal he granted; for the mode of granting varies according to the right in which he was seised: the possessions of the crown being grantable only under the great seal, and those of the duchy of Lancaster under the seal of the duchy or county palatine. 1 Saund. 187 (n. 1). Per Hale. 1 Veni. 222. See ante, p. 125. Also, when the consideration of the king's patent is executory, the plaintiff in pleading such a patent must aver that the thing is done: As if the king grant *pro eo* that I shall find a lamp, release a debt, &c., it ought to be averred that I found the lamp, released, &c. 21 E. 4, 48. Plowd. 455 a. Hob. 231. If a grant be *pro concilio impendendo*, the party should aver that he was ready to give counsel. W. Jon. 294. Com. Dig. Pleader, C. 62. So, if the consideration of a patent be the surmise of the patentee: as if the king, *pro eo* that the manor is escheated, grants; it ought to be averred that the manor was escheated. 21 E. 4, 48, 49. If the king grant an office, with all fees, without naming any; in pleading, it ought to be averred that there are fees in certain, otherwise the grant is only a burthen and no interest, and therefore revocable at pleasure. R. W. Jon. 294. Com. Dig. Pleader, C. 63. But if the consideration of the patent be executed, it need not be averred: as if the king grant for service done. R. Plowd. 455 a. Hob. 231. Com. Dig. Pleader, C. 64. And it is sufficient, when there ought to be an averment, to aver the consideration to be performed, without more: as if the king, in consideration of the surrender of a lease, grants, it is sufficient to aver the surrender made, without saying that there was a lease; for the surrender is the consideration. R. 1 Co. 43. Com. Dig. Pleader, C. 65. It is also necessary to state the grant to have been inrolled in the Court of Chancery, and to make a profert either of the grant itself, or of an exemplification thereof. Ante, p. 138. 1 Saund. 189 (n. 2). See a form of pleading a lease from the crown, 1 Saund. 187, 271.

In pleading a fine, it is not necessary to allege that A., who levied it, was seised in fee, or of any other estate; Semb. Lutw. 1622. 1 Leon. 255. [Dy. 291 a. see Bro. Fines 3;] or if alleged, it is not traversable, R. Lutw. 1621. [1608, 1625,] being merely form: Sav. 85; yet it is usual to allege it; Lutw. 1621. [but see 1 Leon. 255. 1 Saund. 258. 2 Saund. 175. 269;] and in pleading a fine *sur consueance de troit tantum*, it ought to be alleged. Lutw. 1622. It should be pleaded that

quidam finis se levavit &c., and not that A. levied a fine &c.; 2 Inst. 511; or it may be *et fuit quodam finalis concordia* &c. 2 Lev. 31. R. Plowd. 431 b. [So, in pleading a fine, it is necessary to shew in what term and at what place (as at Westminster) it was levied; for the other party may plead no such record or fine. Bro. Pleading, 167.] It is not necessary, however, to state that it was levied in the Common Pleas; *coram Justitiariis Domini Regis apud W.*, is usual and sufficient. Plowd. 431 b. Nor is it necessary to allege before what Justices the fine was acknowledged; Plowd. 105 a.; [but it is doubtful if the case here cited warrants this observation; for in 1 H. 7, 10 b. pl. 13. Bro. Fines 125, it is said that in pleading a fine, every one of the Justices of the Common Bench must be named by their names; and so are all the precedents. Plowd. 353. Co. Ent. 171 a. 182 a. Clift. 305. 2 Lutw. 1016. 2 Saund. 175 e. (n. 2).] If a fine be acknowledged in Hilary term, and recorded in Easter, it may be pleaded *quidam finis se levavit termino Sti Hilarii*, for it was a fine before the engrossing; Semb. Plowd. 431 b. 1 Salk. 341; or it may be alleged specially, as the truth was; Plowd. 431 b. 1 Leo. 76; or *quidam finis se levavit term Hil. & postea term. P. concess' et recordat'*. Bend pl. 141. It is not necessary to state that the fine was engrossed; Semb. And. cont. 1 Leo. 76, 77. Sav. 85; or that the party barred by it was of sound mind, of full age, at large, &c.; Plowd. 376 a. R. 1 Leo. 76. Sav. 85; or that a feme covert was examined. Plowd. 105 a. It is not proper to plead a fine of such lands *inter alia*; 1 Leon. 255; [although most of the precedents are so; and if followed by the words "by the name and description of" &c., stating the parcels, as in the fine, so that there may be no variance between the fine pleaded and the chirograph or copy of the record produced in evidence, it may be sufficient.] If pleaded *prout per finem de recordo hic remanen'* &c., without adding *et per proclam'*, it is sufficient; 1 Leon. 77. Sav. 85; or, indeed, the *prout patet per finem de recordo* &c. may be omitted altogether. 1 Leon. 77. Sav. 85. Com. Dig. Fine, H. 2. But it is necessary in pleading to distinguish whether it was a fine with proclamations, or a fine at common law: if a fine with proclamations, and that the proclamations were necessary to give effect to it, (as in the case of a fine levied by tenant in tail, or to bar strangers, &c.) it must be expressly alleged that it was a fine with proclamations, otherwise it will be intended to be a fine only at common law; Plowd. 361 b. Moor. 220. Palm. 224; and if the proclamations were not made pursuant to the statutes, that fact may be shewn in the plea of the other party, *and the proclamations be thereby avoided. Plowd. 266. 1 Saund. 259 (n. 6.) See forms of pleading a fine with proclamations, 1 Saund. 258. Co.

Ent. 171 a. 582 a. Clift. 305. 2 Lutw. 1016, 1017, Plowd. 354. 428; the like without proclamations, 2 Saund. 269; the like of a *fine sur concessit*. 2 Saund. 175 e. It is not necessary to plead the deed to lead or declare the uses of the fine; on the contrary, it seems objectionable to do so; but it should be stated merely that the fine was levied to such and such uses, according to the legal effect of the deed. Vide infra, and Comb. 403. 1 L. Raym. 154. 2 Salk. 676. Carth. 411.

A common recovery, being a record must be pleaded entire; Hob. 24; and it must appear upon the face of the pleadings to have been a good recovery. It must be stated to have been executed; for, until execution, the party who suffered it was seised in tail as before. R. Jon. 10. Lutw. 1559. [1 Wils. 48.] R. cont. 2 Lev. 31, *but Lev. makes a quære*. If he say that a recovery was had *de tenementis prædicti*, it is bad; for he ought to shew that it was by such names of which a *præcipe* lies. R. Moor, 691. So if he plead that A. being seised in tail, a *præcipe* was brought against B., *ad tunc tenen' liberi tenementi*, without shewing how he had the freehold, it is bad; R. 1 Mod. 218. 2 Mod. 70. Semb. cont. Lutw. 1549; or that A. being seised for life, remainder to B. in tail, a recovery was had against B., *tunc tenen' liberi tenementi*, &c. 3 Co. 59 a. So, if he say that *cestui que use* entered *super recuperationem predictum*, and was seised in fee, it is bad; for he ought to shew entry or execution by force of the recovery, and seisin by force of the stat. 27 H. 8, c. 10. R. Jon. 10. Com. Dig. Pleader, 3 A. 8. Where, after pleading a recovery, the party then pleaded a deed declaring the uses of it, the court held it to be ill pleaded; for, instead of setting forth the deed, he should have pleaded, according to the construction of law, that the recovery was to such uses at the time it was suffered. Comb. 403. 1 L. Raym. 154. 2 Salk. 676. Carth. 411. See the form of pleading a recovery, Lutw. 833. 963. 1550. Clift. 814. 3 East, 346; the like, of a recovery with single voucher, 2 Saund. 89.

In pleading a surrender of an admission to copyhold lands &c., you state the surrender, grant, and admission; see the form, 1 Saund. 146, 147; in pleading a surrender to the use of a will, you state the surrender, will, death of deviser, the presentment of the death and will by the homage, the grant of the lord thereupon to the devisee, and his admission; in pleading a grant by the lord merely, you state the lands to be parcel of the manor, demised and demisable by copy of court-roll, &c. the seisin of the lord, the grant, and the grantee's entry: (which latter is a necessary averment, although not traversable.) 1 Saund. 147 (n. 2). See the form, 1 Saund. 146, 147. and see ante, p. 124. The admittance of a copyholder, as well upon a descent as a surrender, may be pleaded

as a grant. 4 Co. 22. So, he may allege the admittance of his ancestor as a grant, and shew his descent from him, and that he himself entered, without shewing any admittance of himself. 4 Co. 22 b. But he cannot plead that his father was seised in fee at the will of the lord by copy of court-roll, according to the custom of the manor, and that he died seised, *and the land descended to him; because his interest in judgment of law is but a particular interest at will. 4 Co. 22. Cro. Jac. 103. Cro. Car. 180. Bac. Abr. Pleas, I. 7.

In pleading a devise of lands, it is not sufficient to say that the deviser was seised, generally; but it should be shewn of what estate, that the court may judge that he could devise. R. Cro. El. 530. So, if a man plead a devise of land, he ought to plead that it was in writing. Per Holt, 2 Salk. 519. [1 Saund. 276, a. (n. 2.)] So he ought to shew that the deviser died seised; for otherwise the will does not operate. Dy. 143 a. 1 Mod. 217. But he need not state that the deviser was of full age &c., that not being required by the purview of the act, but by a separate proviso. Plowd. 276, a. Com. Dig. Devise, P. See the form of pleading a devise, 1 Saund. 276 a. 2 Saund. 235, 363; the like of a will, whereby the executor becomes entitled to chattels real not disposed of, 1 Saund. 106. 2 Saund. 21. If a man devise his chattels real or personal, or give any specific legacy, the legatee cannot enter into the land, or take the legacy, without the consent of the executor. Co. Lit. 111 a. Perk. s. 468, 570. 1 Ro. Abr. 618. A. pl. 1, 2. Alklyn, 39. Went. Ex. 222. Finch, L. 172. Sty. 55. Therefore the devisee of a chattel real must aver in pleading that he entered into the lands with the consent of the executor; Sty. 65; otherwise he shall be deemed a disseisor. Moor, 538. Owen, 56. So, the legatee of a specific legacy must state the executor's consent to his legacy. See the form, 1 Saund. 276. But when a man seised of lands &c. in fee, devises the same in fee tail, for life, or years, the devisee may enter without the assent of the executor, because the executor has nothing to do with the real estate. Co. Lit. 111 a. 1 Saund. 278 (n. 5).

In pleading an act done pursuant to a power, it must be shewn that the power was strictly pursued in all its circumstances. If it be said that it was executed in the presence of three credible witnesses, it must be shewn who were the witnesses by name. D. 1 Co. 111 a. Com. Dig. Poiar, F.

After pleading a conveyance, it is usual and in most cases necessary to state the effect of it, that is, the seisin or possession the grantee &c. acquired under it: thus, "*By virtue of which said feoffment, he the said J. N. then and there became and was seised of and in the said tenements with the appurtenances, in his demeane as of fee; and being so thereof seis-*

ed" &c., so proceed to set out the subsequent conveyances, if any. And the like in other cases. See ante, p. 121—126. After pleading a lease, it is usual (though not in all cases necessary, see ante, p. 138) to state the entry of the lessee. After pleading deeds operating under the statute of uses, you always after the words "By virtue of which said indenture," add "and by force of the statute for transferring uses into possession," he the said J. N. &c. : see ante, p. 141 ; and if it be a bargain and sale inrolled, you insert the words "and inrollment," after indenture. 2 Saund. 12.

Statutes and other records, how pleaded.] PUBLIC statutes (as has been mentioned, ante, p. 95) are never recited in pleading. 4 Co. 76. Bro. Parl. 69. 2 Ro. Abr. 465. Cro. El. 601. Doct. Pl. *337. Bac. Abr. Statute L. 1, unless in cases where they give a new form of action, 2 Inst. 121. Bro. Act. sur stat. 47, Parl. 75, and do not ascertain the form of the writ. Bro. ibid. Therefore, even where a statute gives an old form of action in a new case, as for instance trespass by an executor *de bonis asportatis in vita testatoris*, it is not necessary to recite the stat. Id. Bac. Abr. st. L. 4. Com. Dig. Act sur st. G. H. But although a public statute need not be recited, yet all the circumstances necessary to bring the matter to be pleaded, within the statute, must be stated or averred, as directed, ante p. 94. See. Doct. pl. 332—336. 3 Wils. 318. 1 Stark, 92. There is this distinction, however, to be taken in declarations, namely, that where a matter not allowed at common law is made lawful for the first time by statute, it must be shown in pleading to have been done strictly according to the directions of the statute, and of every subsequent statute upon the subject: as if a devise of lands be pleaded, it must be shewn to be in writing, as required by 32 H. 8, c. 1, and that the requisites to its validity under the statute of frauds have been complied with: But where a statute makes certain circumstances necessary to the validity of an act, which was already valid at common law without such circumstances, these circumstances need not be mentioned in pleading; thus although by stat. 29 C. 2, c. 3, an assignment of a term must be in writing, yet it is not necessary, in pleading it, to allege that it is in writing, although it must appear in evidence to be so. 12 Mod. 540. Bac. Abr. stat. L. 3. 4 H. 7, 8. 2 Salk. 519. 1 Saund. 276 a. (n. 2.) This distinction, however, it seems, does not hold as to pleas; upon the face of a plea, it must appear that the act was done strictly according to the directions of the statute, whether it were lawful at common law, or rendered so for the first time by statute: thus, where the defendant pleaded that another person for a good consideration promised to be answerable to the plaintiff for the debt, it was holden that it should be shewn to have been in writing, so that it might ap-

pear to be such a contract as the plaintiff could enforce. T. Raym. 450. 1 Saund. 276, a. (n. 2.)

And not only is an affirmative statement of all circumstances necessary to bring the matter pleaded within the statute requisite, but if there be any exception or proviso in the same clause of the act, it must be shewn, negatively, that the matter pleaded is not within such exception or proviso; 7 T. R. 27. and see 1 T. R. 141. 322; and therefore in a *scire facias* on a judgment against a person who had been twice a bankrupt, under stat. 5 Geo. 2, c. 30, s. 9, which says, "the future estate and effects of such a person shall be liable to his creditors unless the estate shall produce sufficient to pay 15s. in the pound," &c. it is necessary for the plaintiff to aver that the bankrupt's estate has not paid 15s. in the pound. 7 T. R. 27. and see Plowd, 410. Bro. Plead. 164. 1 L. Raym. 120. Bac. Abr. Statute L. 3. 1 Str. 66. 2 L. Raym. 1415. 1 Bur. 148. Doug. 346. 8 T. R. 542. 1 East, 646, 647 n. But if the proviso or exception be in a subsequent substantive clause or statute, 1 T. R. 320, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, 1 Barn. & Ald. *94, it is then matter of defence for the other party, and need not be negatived in the pleading. See Cro. Jac. 140. 1 L. Raym. 210.

After thus stating all the facts and circumstances necessary to bring the case within the statute, if it be an action for any thing done or omitted, contrary to the provisions thereof, the statement concludes with these words, "Contrary to the form of the statute in such case made and provided." Where there are two or more statutes on the subject, it may sometimes be doubtful whether this conclusion should be *contra formam statuti*, or *statutorum*. If one statute prohibit the doing of an act, and another afterwards inflict a forfeiture for doing it, a person suing for the forfeiture must conclude *contra formam statutorum*; Plowd. 206; but where a temporary statute is continued by a subsequent one, or where a statute refers to a former statute, and adopts and continues the provisions of it, the proper conclusion is *contra formam statuti*. Lutw. 212. 2 Stra. 1066, and see 1 Saund. 186, (n. 5.) A mistake in the conclusion in this respect however is aided by verdict. Dy. 346, 347. Also, if *contra formam* &c. be used, where there is no statute upon the subject, the words may be rejected as surplusage. 1 Vent. 103, and see Bac. Abr. Plea. I. 4. Sav. 43. 1 Brownl. 196.

A private statute must be specially recited in pleading: otherwise the court cannot take notice of any thing contained in it. 4 Co. 6. 2 Ro. Abr. 466. 2 Mod. 57. Bac. Abr. Statutes L. 2.

A statute passed in a session commencing in the second year and ending in the third year of a reign, cannot be pleaded as passed in the second and third years; even although it have been recognized by a subsequent statute as having been passed in the second and third years. *R. v. Biers*, 1 Ad. & E. 827.

If a statute be recited or pleaded, the day, year, and place of the making of it must be shewn; and if the day of the commencement or conclusion of the parliament be mistaken, it will be bad, *Semb. Cro. Car. 232*, though it be in a private act, and *nul tiel record* not pleaded; for the court *ex officio* will take notice of the commencement, prorogation, &c. of every session of parliament, and consequently (if mis-stated) that there is no such act. *R. 1 Lev. 296. [See 2 M. & S. 132.]* If the session were holden by prorogation, the shortest and safest way of pleading is *ad sessionem parliamenti tant.* such a day and year, in such a place; *2 Cro. 111. Lutw. 140, 1409*; for if the parliament commenced *quinto Eliz.* and were prorogued *ad octavum Eliz.* and then the act passed, if it be pleaded *ad parliamentum tantum octavo Eliz.* it is bad. *R. Plowd. 79 a. R. 2 Cro. 111, 139. Cont. Dy. 95 a. [and quare, see 1 Raym. 210, 343. 1 Lev. 206. Lutw. 140.]* But if the parliament had been only adjourned, it would be clearly bad to plead it as of the 8th year. *12 Mod. 602. 2 Id. 242. 1 L. Raym. 343.* So, where the parliament was summoned the 23rd of January, 1 Eliz. and then prorogued to the 25th January, if it be pleaded that by a statute *in parlamento inchoat' 23 Jan. et tunc prorogat' usque 25 Jan. edit'*, it is bad; for the parliament did not commence till the 25th Jan; *R. Dy. 208 a*; [and the words *usque ad* must be considered as inclusive of the day to which they relate. *1 L. Raym. 210.*] So, if a statute be pleaded as made the 2d November, 2 and 3 Ed. 6, it is bad; for the same day cannot be in two years. [*R. Moor. 302.* {So, when pleaded as made in the 8 & 9 W. 3, it was holden bad; for it should have been pleaded as of the 8th year, in which the session began. *Portescue, 372*, but see *Cowp. 474.*} So, if a statute be pleaded to have been made the 29 Eliz. where the parliament commenced the 28 *Eliz. it will be bad; *R. 2 Lev. 333. R. 1 And. 295. See Lutw. 1117*; or at a session, 18 Feb. 14 Car. where the prorogation was 18 Feb. 15 Car. *Semb. T. Raym. 191.* {It is not necessary to recite the title of a statute, *1 L. Raym. 77*, or the preamble, *6 Mod. 62. 8 Mod. 144*, for they are no part of the statute; *Bac. Abr. Statute L. 3*;] yet if the party recite the title of an act, and it be misrecited, it will be bad. *6 Mod. 62, 63. 2 Salk. 609.* As to the body of the act, it is sufficient to recite so much of it as concerns the matter in question; [*Plowd. 106, 65, 410. Cro. Jac. 140. T. Jon. 50. Dy. 168 b. Doct. Pl. 334*;] and therefore if it be said,

inter alia inactitatum fuit, it is well. Plowd. 85 a. And if the party recite so much of a statute as makes for him, it is sufficient, though he omit a proviso or other clause that makes against him; R. Plowd. 105 a. R. 2 Cro. 139; [provided such clause &c. be not in the same section or part of the statute with the part so pleaded, but form a subsequent substantive clause; Plowd. 410. Bro. Plead. 164. 1 L. Raym. 120. Bac. Abr. Statute L. 3; in which case the opposite party may make such subsequent clause or proviso a part of his pleading. Cro. Jac. 140. 1 L. Raym. 120.] If, in reciting a statute, there be a material variance, the pleading is thereby vitiated: as if the time or place of making it be mistaken, R. Lutw. 140. [Dy. 74 b. Fortesc. 372. 4 Co. 13 a.] *Vide supra*; or if the act be recited in conjunctive words, where it is in disjunctive; R. Cro. El. 96, 697. [6 T. R. 771. and see 2 Bulst. 47, 48, 49.]; so, if in reciting the stat. 5 El. of perjury, it be stated "*quod quibbet &c. admitteret et forisfaceret*" for "*amitteret*;" R. 2 Cro. 133; or if, in the recital of the stat. 8 H. 6, c. 9, "if any offence or discontinuance thereof be made," the word thereof be omitted: R. Cro. El. 697: in all these cases the misrecital is fatal. [See 1 L. Raym. 382. Cro. El. 186, 262. Cro. Car. 186. And it makes no difference in this respect whether the statute be private or public: for if a party undertake to recite a public statute, and misrecites it, it is as fatal as in the case of a private statute. Plowd. 79, 84. Bro. Parl. 87. Cro. El. 236. Cro. Car. 282. 2 Mod. 99. So, if the title or preamble of a statute be misrecited, it is fatal, although it was not necessary to state it, as already mentioned. 6 Mod. 62. If the year, day or place of making a private statute be misstated, it may be taken advantage of upon a general demurrer. Moor. 551. 1 L. Raym. 210, 242. 1 Lev. 296. 1 Doug. 97 n. Ante, p. 146, or it seems by motion in arrest of judgment; see 2 L. Raym. 142; but if the matter of the statute be misrecited, advantage can be taken of the variance only by pleading *nil tiel* record. 1 L. Raym. 382. 2 Mod. 241. see 1 Sid. 356. If a public statute however be misrecited in the year, day or place of making it, or in the matter of it, advantage may be had of it either upon general demurrer, Bro. Parl. 87. Cro. Jac. 211. 2 Hawk. c. 35, s. 104, or by motion in arrest of judgment, 6 T. R. 771, or by writ of error; indeed the court, in such a case, cannot give judgment, even if the parties should consent to it. Cro. El. 245. Doug. 97.] A trifling or immaterial variance, however, will not prejudice: 2 Bulst. 47, 51: as if an act say "if a recovery be in *aliquibus curiis*" and it be recited "*in aliqua curia*," it is sufficient. R. Cro. Car. 523. [and see Cro. Car. 186. 1 L. Raym. 382. *2 Mod. 96. T. Jon. 51. 3 Wils. 318. 2 Bulst. 47, 48, 49. But this does not extend to a substantial variance in mat-

ter unnecessarily set out, 1 Doug. 97. 6 Mod. 62, unless perhaps after verdict.] Also, if, after pleading a public statute, you conclude "*contra formam statuti in hujusmodi casu editi*," a misrecital is not fatal; but if you conclude "*contra formam statuti prædicti*," or "*vigore statuti prædicti*," it is otherwise. Lutw. 140. [Fortesc. 372. 1 Str. 212, 1 Ld. Raym. 392. Plowd. 79, 84. Cro. Car. 233. Freem. 311.] Com. Dig. Action upon stat. I. See the form of pleading a statute, 1 Saund. 193.

In pleading a judgment, it is not necessary to set forth all the proceedings in the cause; it is sufficient to state shortly that the plaintiff in Easter term &c. impleaded the defendant in the court of our lord the king before the king himself (the said court then being &c.) in a plea of debt (or as the case may be,) and that such proceedings were thereupon had, that afterwards in Trinity term &c. the plaintiff by the consideration of the said court recovered his said debt &c. 1 Saund. 92. (n. 2.) So, in pleading the judgments even of inferior courts, whether of record or not, it is now holden not to be necessary to set out the cause of action, or that the defendant became indebted within the jurisdiction of the court; but it is sufficient to say, that at a certain court &c. holden at &c. J. N. levied his plaint against J. S. in a certain plea of trespass on the case, or debt &c. (as the case may be,) for a cause of action arising within the jurisdiction of the court, and thereupon such proceedings were had, that afterwards &c. it was considered by the said court that the said J. N. should recover against the said J. S. &c. Cowp. 16. Formerly it was necessary to set forth the whole proceedings in the inferior court, it not being allowable to set them out with a *taliter processum fuit*; 2 Lutw. 913, 918. 2 Vent. 100; latterly, however it has been holden otherwise. 2 Lev. 81. 1 L. Raym. 60. 3 Lev. 408. 1 Wils. 317. 2 Wils. 5. 2 Lutw. 1410. 1414. 2 Mod. 102. 195. Carth. 53. 2 Lutw. 1369. 1 Saund. 92. (n. 2.) and see Com. Dig. Pleader, 2 W. 12, E. 18. But although, in pleading, the judgment of an inferior court is stated thus shortly, in evidence the whole of the proceedings must be proved, in the same manner as formerly when the whole of the proceedings were set out.

As to the pleading of fines and recoveries, see ante, p. 142. 143.

In pleading a recognizance, you state that the cosutor came into court and became pledge &c. in the same manner as set forth in the recognizance roll, (see 1 Arch. Pr. C. B. 281. Arch. Forms, 257, 258,) except that you state it in the past instead of the present tense, and add time &c. In stating a recognizance of bail, it must be shewn expressly at whose suit the cosutor became bail, and for what sum the action was brought. 1 Wils. 284. Indeed in all cases of pleading a recogni-

nance or statute staple &c. the party pleading it must shew the certainty of the statute or recognizance. Ash. Ent. 223. Rast. 189 a. [and see 1 Barn. & Ald. 153.] And therefore if he declare *quod A. coram Ch. J. concessit se teneri, &c. et si defecerit, concessit per idem scriptum quod currentent super se pena in stat' stap,* without saying *per scriptum suum obligatorium, or secundum formam statuti*, it is bad. R. per 3 J. Cro. Car. 363. So, *if the declaration do not shew the statute to have such seals as the act directs, it will be bad. Moor, 811. But if the statute be recited merely as inducement to the action, it is sufficient, though it be not said that it was *sub sigillo*. R. Moor, 811. So if the jury find that A. *recogn' se debere* &c. without saying *per scriptum obligatorium, or secundum formam statuti*, it is sufficient. R. 4 Co. 65 b. Com. Dig. Pleader, 2 W. 10.

A writ is pleaded thus; that J. N. prosecuted out of such a court (stating the style of the court) a certain writ called a Capias &c. whereby it was commanded &c., or whereby our said lord the now king commanded &c. so stating the substance of the writ. See the forms. 1 Saund. 17, 18, 330. 2 Saund. 52. 77. See the form of pleading a ca. sa. 2 Saund. 98, 99; a *fi. fa.* 1 Saund. 303, 304; an *elegit*, 2 Saund. 68 a. &c.

Strictly speaking, the pleading of a matter of record, in all cases where *nul tiel record* may be pleaded in answer to it, should conclude with *prout patet per recordum, &c.* A judgment is always so pleaded; see ante, p. 137; So, fines and recoveries, although holden not to be necessary; see ante, p. 142, 143; So, a recognizance; ante, p. 137; but writs are never pleaded with a *prout patet*, except in a replication of a writ with continuances, to a plea of tender or of the statute of limitations. Where *prout patet per recordum* is requisite, the omission of it can be taken advantage of by a special demurrer only. 4 Ann. c. 16, ante, p. 138.

Averment, how made.] An averment is usually made thus: "And the said J. N. in fact saith that" &c., then stating the matter of the averment. It is not necessary however that it should be thus in express words; for "*licet*" is a sufficient introductory word; R. 2 Cro. 383. Plowd. 125, 126. R. 3 Leon. 67. [1 Saund. 116, 117. (n. 4.) 1 Lev 194. 2 Vent. 278. Dy. 257. Yelv. 121.;] or "*pro eo quod*:" R. 1. Saund. 117. Semb. 2 Vent. 278. R. 1 Lev. 194. [2 Lutw. 1188; or "*per quod*;" R. 2 Rol. 379;] or "*quia*." Co. Ent. 122 b. 1 Lev. 194. "*Quod vendidit warrantizando*," is a sufficient averment that he warranted. 2 Salk. 686. So, "*proferendo satisfactionem*," is a sufficient averment of a tender. R. 2 Salk. 686. So, that A. demised to B., who entered and was possessed, "the reversion thereof belonging to the said

A.,” this is a sufficient averment that A. had the reversion. R. 1 Salk. 13. [So, “*dans plagam mortalem*” is a sufficient averment. 5 Co. 120.] So, any words which imply such a matter to be so, are sufficient: as if it be pleaded that A. was seised, and that he died, and the land descended to B. as his son and heir, this is a sufficient averment that A. died seised, though it be not said *sic inde seisit’ obiit*; for otherwise it could not have descended to B. as his heir. R. Lutw. 1172. So, *presentat fuit* that he did a trespass, is sufficient, though it be not expressly averred that he did it. Semb. 2 Cro. 582. *Quod scribi et ingrossari fecit indenturam, per quam mentionat’ quod demisit &c. quam sigillavit et deliberavit ut fact’ suum, virtute cujus fuit possessionatus*, is a sufficient averment of a demise, though it be not expressly said *quod demisit*. R. 2 Jon. 24. [So, *indentura fact’* between lessor and lessee, whereby lessee *convenit et agreavit* to pay *the rent, is a sufficient averment of a sealing by him. 1 Str. 512.] “That, by the custom of London, they hold pleas of debt arising within the city, and that he levied a plaint according to the custom,” is a sufficient averment that the debt, for which the plaint was levied, arose within the city. R. Vaugh. 92. “That he paid a debt of his intestate, and took a term in satisfaction,” imports that he paid it with his own money. R. 1 Lev. 154. “That by losing a poll, *perdidit officium*” imports that it would have appeared that he had a majority, if the poll had been taken. R. 2 Lev. 50. An avowry by a husband, seised in right of his wife, for rent *aretro existen’*, is a sufficient averment of the life of the wife. R. on special dem. 2 Lev. 88. [and see ante, p. 123. 1 Brod. & B. 224. Doct. Pl. 247.] So, if there be a covenant to make a surrender of a copyhold, and the covenantor say *quod sursum reddidit* to two tenants according to the custom, it is sufficient without shewing the custom. R. 1 Mod. 61. If a matter be to be determined by the groom porter, an averment that he adjudged *in casu prædict’* is sufficient. R. Lutw. 488. In debt against an executor for 10*l.* which *injuste detinet*, it is a sufficient averment that the testator did not pay. 1 Vent. 136. So, in debt against A. on articles that he or B. would pay, for 10*l.* which A. *injuste detinet*; if B. sealed, it is a sufficient averment that B. did not pay. R. 1 Vent. 136. So, *quod A. seisitus de manerio, unde prædict’ messuagium fuit parcell’ a tempore cujus &c.* levied a fine, is a sufficient averment that it was parcel at the time of the fine. 1 Leon. 75. If a custom be alleged for tenants to erect stalls in a market, it is a sufficient averment that the market is within the manor. R. 3 Lev. 190. If a breach be, that the defendant did not cover with lead, according to the rules prescribed by the statute for the re-building of London, this is a sufficient averment that the statute does require it. R. 2 Lev. 85. “That he entered,”

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without saying "by night" or "by day," is sufficient, if he say he entered lawfully. 2 Mod. Ca. 320. Com. Dig. Pleader, C. 77. and see Str. 594. 2 L. Raym. 1366.

Having thus treated of averments generally, we shall now proceed to consider the manner in which particular averments should be made. And first, as to the averment of performance of a condition precedent. The party pleading must aver a performance according to the intent of the condition, covenant, &c.; for it is not sufficient merely to pursue the words, but it must appear to have been performed according to the intent. Thus, on a promise, in consideration that he would cause A. to come to be bound to the defendant for 20*l.* it is not sufficient to aver that he caused A. to come to be bound, but he ought to say that he was bound. R. Yelv. 50. On a promise to drain lands, *ita quod sint siccae in extremitate hiemis, viz. aliquo tempore inter All Saints and Candlemas*, it is not sufficient to say that *fuertunt siccae in extremitate hiemis, viz. aliquo tempore* between those feasts, but it should be averred that *fuertunt siccae* for all that time, or that they did not overflow *aliquo tempore* &c., for that was the import of the words. R. 2 Rol. 246, l. 30. Com. Dig. Pleader, C. 58. And he ought to show an exact performance: as on a promise in consideration that he would procure 20*l.* for one year, it is not sufficient to say that he procured 10*l.* the 23d April, *and 10*l.* the 23d June; for he should have procured the whole for an entire year. R. Yelv. 87. So, if it were to procure 20*l.* in gold, 10 guineas and the residue in silver would not be sufficient. Ibid. So, on a promise to an attorney, in consideration that he would acknowledge satisfaction on record &c., it is not sufficient to say that he *tanquam attorn'* acknowledged satisfaction; for perhaps his warrant was revoked. R. 1 Rol. 366. So, on a promise in consideration of a lease of lands for 10*l.* per ann., it is not sufficient to say that he made a lease of the said land, without saying that it was for 10*l.* per ann. R. 3 Bulst. 35. On a promise to pay before the next journey of the plaintiff to London, it is not sufficient to say that *inceptit iter* such a day, but it ought to be said that he made his next journey, &c. R. Yelv. 176. In consideration that he would repair on request, it is not sufficient to say *reparavit*, if he do not add "on request." R. 2 Leon. 53. Com. Dig. Pleader, C. 59. So, on a covenant to pay, if it should appear to a court-martial that the ship's company had made the utmost defence they were able, it is not sufficient to aver that it would have so appeared to a court-martial, if the defendant had called one. 1 T. R. 642, cit. So, upon a covenant to pay freight at a certain rate for deals "delivered at Liverpool," &c., it is not sufficient to aver that the ship was wrecked before she arrived at Liverpool, and

that the defendant had accepted the deals and sold the same to his own use; although such acceptance might be good evidence of a new contract between the parties, if the plaintiff had declared upon it as such. 7 T. R. 381, see also Str. 653. It is also necessary to shew performance with such certainty, that the court may judge if the covenant &c. be performed according to the intent of the parties; therefore, on a promise, in consideration that he would procure a sufficient man to be bound, it is not sufficient to say that he procured a sufficient man, but he ought to shew of what sufficiency he was, that the court may judge whether he was sufficient or not. R. Yelv. 49. Danv. 71. So, on a promise, in consideration that he would execute an indenture &c. *per quam burgalizaret*, it is not sufficient to say that he executed the indenture aforesaid, but he ought to shew that he executed such an indenture *per quam burgalizavit* &c.; R. Yelv. 111; but if the consideration were, to execute such an indenture in certain, "that he executed the indenture aforesaid" would be sufficient. Yelv. 111. [And see] 1 Str. 88. So, upon a promise, in consideration of the plaintiff's making a good and sufficient release of an equity of redemption, he must shew how he did it, in order that the court may see whether it were done according to the agreement; otherwise his declaration will be bad on demurrer. L. Raym. 662. 1 Salk. 171.] If a promise be to deliver 15 *todas lanæ*, to be chosen by A. out of 17; in assumpsit for not delivering them he ought to shew that A. chose 15 *todas*; for the election is the first act. R. after verd. Yelv. 76. On an assumpsit in consideration that he would abate 10*l.* part of a debt, is not sufficient to say he did abate without shewing how. R. Cro. El. 477. So, in consideration that he would acquit A. of a debt, it is not sufficient to say that he acquitted him, without shewing how. R. 2 Cro. 503. If the consideration of an assumpsit be that he shall give a bond with sureties *it is not sufficient to say that he tendered a bond, if he do not say in what sum and what sureties. R. Hob. 69. If a declaration recite an agreement that A. would lease for years to B., but that B. refused to seal the indenture because a covenant was inserted for repair generally; and that the defendant, in consideration that B. would seal, and the plaintiff would give a bond for the performance of covenants, assumed to repair during the term: it is not sufficient to say that B. sealed, without shewing that a demise was made. R. Yelv. 18. If a devise be, that land shall be sold, if his goods be not sufficient to pay his debts; in an avowry by the vendee, he should shew the amount of the debts and the value of the goods, so that the court may judge if the condition precedent to the devise have been performed. R. W. Jon. 328. But it is sufficient to allege a performance in words which in evidence import it: as if a pro-

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mise be to receive A. and B. *ut hospites*, and to find necessities ; if he allege that he received them and found necessities, it is sufficient, without saying *ut hospites*. R. 1 Salk. 25. So, if a promise be to discharge from arrest ; if he allege *quod exoneravit*, it is sufficient, for he need not say how, as in the discharge of a bond or rent. R. Cro. El. 914. So, if a promise be in consideration that he, at the request of the plaintiff, would procure a note of B., it is sufficient to say that he procured a note, without saying at his request, for a subsequent request was not intended. R. 2 Vent. 75. And in all cases, if the plaintiff allege a performance, but do not shew how, it shall be aided after verdict. R. 2 Jon. 125. Com. Dig. Pleader, C. 60. Also, if the plaintiff shew a certain and exact performance, it is sufficient in general terms, without alleging particularly how he performed : as, on a promise to pay *quant dispenderet* for the officers of the army in such a suit ; an averment that he spent so much is sufficient, without shewing for what officers in particular. R. T. Raym. 9. [On an agreement to purchase land on having a good title ; averment that the title to the land was made good, perfect and satisfactory to the defendant, was holden sufficient, without setting out the particulars of the title. 6 East, 555.] On a promise in consideration that *renunciaret* the executorship, an averment that *renunciavit* is sufficient, without saying before whom or how. T. Raym. 400. That *conaret maritagium* ; averment that *conatus fuit* and it took effect is sufficient, without saying how he endeavoured. R. T. Raym. 400. Danv. 72. Moor, 595. That he would forbear a suit ; it is sufficient to say that he did forbear, generally, without saying *hucusque*, R. 2 Mod. 24 ; or that he forbore from the time of the promise *hucusque*, is sufficient, though to be intended a total forbearance. R. 2 Mod. 24. R. Hardr. 5. That he would discharge from a promise of marriage ; *quod exoneravit* is sufficient, without shewing that the other was present or had notice ; for a full discharge shall be intended. R. 1 Rol. 470, l. 5. Style, 595, 303. So, upon a promise to pay &c., if he disliked the land in 14 days, it is sufficient to say that he disliked ; for it shall be intended within the time, until shewn to have been otherwise on the other part. R. Cro. El. 834. So, if a promise be to pay in spanish money ; averment that he gave a bill for so many dollars, is sufficient. R. 2 Cro. 7. So, an averment that the plaintiff has performed all on his part *to be performed, is sufficient. R. on dem. Lutw. 253, and see Hardr. 103, 104. So a declaration on a promise to pay so much to cure his daughter, and another count to pay so much for the cure, is sufficient, though it be not averred that he has cured ; for by the second count it appears that she was cured ; and if that appear by any part of the record, it is well. [Qu.] R. after verd. 1 Mod. 14. Danv.

73. An averment that *paratus fuit et obtulit* to perform, however *is* not sufficient, if he do not say that he was hindered by the defendant. 2 Saund. 352. R. 1 Rol. 465, l. 30 [see ante, p. 86, 87]. Yet *parat' et obtulit* will be sufficient after verdict. R. 2 Saund. 352. 2 Lev. 23. So *parat' et obtulit* will be sufficient, where nothing is to be done on his part, till the other has done a prior act: as if A., being a bailiff, assume for 10*l.* to arrest another at the suit of B., it is sufficient to aver that he was ready, but that B. did not deliver him any warrant. R. 1 Rol. 465, l. 40. [See, however, more fully upon this subject. ante, p. 86, 87.] Com. Dig. Pleader, C. 61. As to the cases in which an averment of performance of a condition precedent is necessary, see ante, p. 84—90.

It has been already stated (ante, p. 90), that where a man contracts to do a thing upon request, the request is *quasi* a condition precedent to his performing his contract, and consequently must be averred in the declaration. In assumpsit for money lent, or a mere duty, *licet sapius requisitus* is sufficient. R. Cro. El. 73, 74. Agr. 2 Cro. 183. Per Hought. 2 Cro. 523. R. Yelv. 66. `Hut. 2. Per 3 J. Cro. Car. 35. Agr. 4 Leon. 2. R. Cro. El. 218. R. Winch. 2. [1 Str. 88.] So in assumpsit for a collateral sum, if it is not to be paid upon request. R. Lutw. 231. R. Ow. 109. So in assumpsit to pay, in consideration of marriage; for it is in the nature of a debt. R. Cro. El. 229. So, in assumpsit for the repayment of money received for a horse. R. 3 Lev. 364. Skin. 347. So, in assumpsit to pay, if he would procure a note from B. for it; averment that he procured the note, *et requisivit solvere*, is sufficient. R. 2 Vent. 74. So, in debt on a bill &c. to be paid upon request, a general request is sufficient. R. Cro. El. 548. So, in annuity, debt on bond &c., to pay upon request, no special request need be stated. R. Cro. El. 548, 721. So if the request be executed, no averment is necessary: as if A. promise to pay &c., in consideration that B. at his request would be a night. R. 2 Lev. 198. Com. Dig. Pleader, C. 70. But if the action be for a collateral sum to be paid on request, the request is parcel of the agreement, and traversable, and ought to be specially alleged, with the time of the request; Adm. Lutw. 231. R. Cro. El. 85. R. Ow. 109. Cont. per 2 J. 1 Brownl. 10. R. acc. W. Jon. 56, 85. R. Sav. 72. [Yelv. 66. 2 Bulst. 229. 3 Bulst. 298. 2 Roll. Rep. 62. Latch. 209. 3 Leon. 73, 200. Cro. Car. 384. 1 Saund. 32, 33. (n. 2.)]; and the same, when the action is for a collateral matter to be done upon request: Adm. Lutw. 231. [5 T. R. 409]: as in assumpsit to pay all sums expended for him; R. Cro. El. 83, 84; or to pay 6*s.* for every stone of wool delivered; R. Cro. El. 91; or to pay for victuals for him and his horse. R. 2 Cro. 183. So

in covenant for not delivering timber for repairs, he ought to allege a special request. 1 Brownl. 23. [But if a man promise to deliver goods upon request, *and afterwards sell the goods to another person, this supersedes the necessity of alleging a request to deliver, in an action for the non-delivery of them. 10 East, 359. The want of a special request (when necessary) is matter of substance, and may be taken advantage of on a general demurrer; 5 T. R. 409]; and is not aided after verdict. R. 3 Bulst. 299, nor by pleading *non assumpsit*, and a verdict thereon, for that is no waiver of the request. R. W. Jon. 86. Com. Dig. Pleader, C. 69. But if the plaintiff allege a special request, but omit the day or time merely, and if the defendant do not join issue on the request, but plead *non assumpsit*, it shall be aided. R. W. Jon. 56. Com. Dig. Pleader, C. 70. And if it be said that the plaintiff at such a day and place shewed the note *et requisivit*, it is sufficient, without saying *adunc et ibidem*; for the whole shall be intended to have been done at the same time. R. 2 Vent. 75. So if a special request be alleged in the first count, *similiter requisitus* is sufficient in the second count, for it refers to the first. R. Cro. El. 240. *Licet requisitus* also is as well as *in facto requisivit*; for *licet* is affirmative. R. Yelv. 121. Com. Dig. Pleader, C. 72. If an action be brought by an executor, on a promise to pay to his testator on request; if a special request by the executor be alleged, and *licet requisitus* only by the testator, it is sufficient, for the action is founded upon a request by the executor. R. Hardr. 38. Also, if a promise be by three, a special request to one is sufficient. D. Noy, 135. Com. Dig. Pleader, C. 71.

Lastly, as to the averment of *Notice*: we have already considered in what cases this averment is necessary, (ante, p. 90—92,) it now remains merely to state how the averment shall be made. When notice is necessary, it ought to appear that it was given in due time. See 1 Rol. 469, l. 45. So it ought to appear that it was given to a proper person; as, if a condition be to repair upon notice, notice ought to be alleged to have been given to him who had the entire interest, and not to an underlessee; R. Yelv. 37. 2 Cro. 9; and to him in person. R. Yelv. 37. But on a sale of East India stock, if demanded *ore tenus*, or by writing at the East India House; an averment that he demanded *ore tenus*, or by writing at the East India house, is sufficient, without a personal demand; for the usage is such. R. Skin. 391. Com. Dig. Pleader, C. 74.

SECT. III.

Conclusion of the Declaration.

In the actions of Trespass and Ejectment, the declaration concludes thus: "Against the peace of our said lord the King, and to the damage of the said J. N. of £——; and therefore he brings suit &c."

In assumpsit, debt on simple contract, debt on specialty, debt on record, debt on statute by a party grieved, covenant, detinue, case, trover, and replevin, the conclusion of the declaration is thus: "To the damage of the said J. N. of £——; and therefore he brings suit &c."

In debt *qui tam*, it is thus. "And therefore as well for our said *Lord the King" (or as the case may be) "as for himself in this behalf, he brings suit &c."

Having now given the usual forms of conclusions of declarations, it may be necessary to notice the particular parts of them more minutely; which shall be done under the following heads:—

Contra pacem.] In trespass and ejectment, the injury complained of must be stated to have been done "*contra pacem domini regis nunc*," if done in the reign of the present king, or "*contra pacem nuper domini regis*," if in the reign of the late king. The omission of it, however, is aided after verdict by stat. 16 & 17 C. 2, c. 8, and after judgment by confession or default by stat. 4 A. c. 16, s. 2, and can be taken advantage of only by special demurrer. 4 A. c. 16. So if the declaration conclude "*contra pacem regis nunc*," and the trespass be therein stated to have been committed in such a year, which was in a former reign, it is not fatal after verdict. R. 2 Salk. 640. Or if "*contra pacem nuper regis et regis nunc*," and the trespass be alleged in the former reign only, the words *et regis nunc* may be rejected as surplusage after verdict, R. 2 Cro. 377. 3 Bulst. 82. R. Carth. 95, although perhaps assignable for cause in a special demurrer. See 1 Show. 28. See also 2 Salk. 636. 11 H. 4, 14 b. 2 Vent. 49, and see Com. Dig. Pleader, 3 M. 7, 8.

Ad damnum.] In all personal and mixed actions, with the exception of actions of debt *qui tam*, the declaration concludes *ad damnum* of the plaintiff or plaintiffs. In an action by a prior and his brethren, it may be *ad damnum ipsius prior* or *ad damnum ipsorum*. Th. Dig. l. 10, c. 25. So, in an action by husband and wife for a battery &c. of the wife, *ad damnum ipsorum* is good; Th. Dig. l. 10, c. 25. R. 2 Cro. 664; and the same in all cases where the action would survive to the wife. Danv. 720. R. 1 Sid. 387. 3 Mod. 120, and see Com. Dig. Pleader, 2 A. 1. But in trespass *quod clausum fregit et bona B. ibidem*

cepit, ad damna ipsorum is bad. R. 2 Mod. Ca. 370. Com. Dig. Pleader, C. 84.

In assumpsit, covenant, trespass, case, trover and replevin, the damages stated in the conclusion of the declaration should at least be equal to what the plaintiff may think the jury will give him for the tort or breach of contract complained of; for they cannot give more than is stated in the *ad damnum*, R. 1 Bulst. 49, although they may give less. If there be any error by miscasting, it shall not vitiate: as where in assumpsit there are several counts for several sums, and the sum in the *ad damnum* exceeds the total of these sums, this miscasting shall not prejudice. R. Latch. 175. R. Poph. 209. R. 1 Lev. 58. Yet if there be a variance, as if the declaration be *ad damnum* 40*l.*, and the writ only 20*l.*, if the verdict find less damages than are mentioned in the writ, it is good; R. 2 Cro. 629; so a variance of this kind is aided after verdict by 5 G. 1, c. 13; or if the jury find greater damages than are named in the writ, the plaintiff may cure the defect by entering a *remittitur damna* for the excess. R. 2 Cro. 128. So, if a verdict be given for more damages than are laid in the declaration, the plaintiff may remedy it by entering a *remittitur* for the excess. 2 Arch. Pr. C. B. 258. If the *plaintiff however have judgment for more damages than are laid in the declaration, it is error; R. 1 Bulst. 49; yet even in this case the defendant cannot avail himself of it; for even after error brought on account of it, and in a term subsequent to the signing of the judgment, the court have allowed the plaintiff to remedy the defect by entering a *remittitur damna*. 4 M. & S. 94. 2 Arch. Pr. C. B. 258.

In detinue, the damages laid are merely nominal. 1 Arch. Pr. C. B. 195. In debt also the damages laid are usually merely nominal because the debt itself is the principal object of the action; with these exceptions, however, that in debt on bond conditioned for the performance of some specific act, the damages are usually laid in the amount of the penalty or upwards; and that in debt on judgment, the damages laid are usually sufficiently large to include the interest due upon the judgment. See 7. T. R. 448. In ejectment also the damages are merely nominal.

The damages we have now been considering, as being included in the *ad damnum*, are such as in contemplation of law are naturally consequent upon the act complained of, and merely the amount of them remains to be ascertained by the jury. But where the plaintiff has received any specific injury from the tort or breach of contract complained of, (which is termed special damage,) he will not be allowed to give it in evidence at the trial, unless it be plainly, explicitly and with certainty stated in his declaration. Str. 686. 1 Saund. 243 b. (n. 5.)

However, if in such a case he fail in proving the special damage, he is still entitled to the general damages laid in the *ad damnum*, or to such part of them as the jury may think a proper compensation for the injury complained of and proved. But there are other cases in which the tort complained of is not the subject of an action, unless the plaintiff have thereby sustained a specific injury; and in such cases, the special damage must not only be laid in the declaration, but must also be proved at the trial: otherwise if laid and not proved, the plaintiff must be nonsuit, or the defendant have a verdict; or if not laid, the defendant may take advantage of it, either upon demurrer, or by motion in arrest of judgment, or by writ of error. In both cases, the special damage must be laid with as much certainty as any other facts in the declaration: and therefore saying that divers persons (without naming them) have withdrawn themselves from the society of the plaintiff, 1 Saund. 243 b. (n. 5,) or that several customers ceased to deal with him. Bul. N. P. 7, or, in an action for slander of title, that the plaintiff thereby lost the sale of his lands, W. Jon. 196, have been holden too general and bad.

Pledges.] Formerly, pledges were added at the foot of the declaration, thus: "Pledges to prosecute, John Doe and Richard Roe;" the plaintiff being nominally obliged to find pledges to prosecute, and to answer the amercement if he should be nonsuit. 2 Cro. 414. But now by Reg. Gen. M. 3 W. 4, s. 15, the entry of pledges to prosecute, at the conclusion of the declaration, shall in future be discontinued.

*SECT. IV.

Joinder of Counts.

In real and Mixed Actions.] There is never more than one count in a real action. See Bac. Abr. Action C. 8 Co. 86 b. 87. Com. Dig. Action G.

Mixed actions may in general have two or more counts in the same declaration: Thus, an assise lay for several rents upon several titles. Th. D. l. 8 c. 26, s. 1, 2, see Danv. 3. So, waste lay upon several leases. 8 Co. 87 b. Poph. 24. Cow. El. 290. Owen, 11. So, ejectment may be brought upon several demises and ousters. But there can be but one count, it should seem, in *quare impedit*; see Moor, 184; at least I am not aware of a precedent of more.

A count in a real action, and a count in a mixed action, cannot be joined in the same declaration; nor a count in a mixed and a count in a personal action; nor a count in one mixed action, with a count in

another. Thus, for instance, ejectment and trespass cannot be joined in the same declaration; Th. D. l. 10 c. 15, s. 1 Semb. 5 Mod. 91. Hob. 249. Brownl. 235; or the like.

A declaration in assumpsit for toll of coals imported into the port of Truro, contained two counts, one claiming the toll as a metage duty, and the other as a port duty: the court held that these counts were for the same subject-matter of complaint within the meaning of the rule 4 Will. 4 s. 5; and they made a rule absolute for striking out one of them, unless the judge at chambers, on a reference back to him, should exercise his discretion given him by the rule, and allow both counts, upon the plaintiff undertaking to give distinct evidence in support of each. *Jenkins v. Treloar*, 1 Tyr. & Gr. 316.

Where a declaration in debt contained one count for double rent, and another for use and occupation, the court refused to strike out one of them, considering them as being for distinct matters of complaint. *Thornton v. Whitehead*, 1 Tyr. & Gr. 313.

In personal Actions.] In personal actions, two or more counts may be, and usually are, joined in the same declaration for different causes of action. Formerly this might be done, where the several counts were for the same cause of action, the plaintiff being allowed thus to shape his case in different ways, that if he failed in one, he might have a chance of succeeding upon another. But this privilege being much abused, the courts have from time to time endeavoured, by rules and otherwise, to repress the abuse. Where counts manifestly unnecessary have been added, they have ordered them to be struck out, and in some cases have ordered the plaintiff to pay the costs. See 2 Arch. Pr. C. B. 195. But this was not effectual. The courts therefore, by a rule (Reg. Gen. H. 2 W. 4, s. 74,) ordered that no "costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. But even this did not remedy the abuse; and therefore the courts have lastly ordered, by the rules of pleading (Reg. Pl. H. 4 W. 4, s. 5,) "several counts shall not now be, allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each;" "and therefore counts founded on one and the same principal matter of complaint, but varied in statement description, or circumstances only, are not to be allowed." *Id.* This, however, "is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract, in the same count." *Id.* And "where more than one count shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts

are founded on the same subject-matter of complaint, for an order that all the counts introduced in violation of the rule be struck out, at the *cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is bona fide intended to be established in respect of each of such counts, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied, and shall also specify the counts mentioned in such application, which shall be allowed." *Id.* s. 6. And "upon the trial, where there is more than one count upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, a verdict and judgment shall pass against him upon each count which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, including those of the evidence as well as those of the pleadings." *Id.* s. 7. "And further, in all cases in which an application to a judge has been made under the preceding rule, and any count allowed as aforesaid upon the ground that some distinct subject-matter of complaint was bona fide intended to be established at the trial in respect of each such count so allowed, if the court or judge before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was bona fide intended to be established in respect of each count so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count with respect to which the judge shall so certify." *Id.*

As to what counts may be joined, the following general rules seem to be established upon the subject: namely, that where the same plea may be pleaded to, and the same judgment given on, several counts, they may be joined in the same declaration. 1 T. R. 274. Also, where counts are of the *same nature*, requiring the same process, and the same judgment may be given on them all, though they may admit of different pleas, (as for instance debt on judgment and on a *mutuatus*, or debt on bond and on a *mutuatus*) they may be joined. 2 Saund. 117, c. (n. 2.) Gilb. C. B. 6. and see 1 Wils. 248. 2 Wils. 321. 3 Wils. 354. And lastly, that a count founded on tort, and one founded on contract, cannot be joined in the same declaration. 2 Saund. 117, c. (n. 2.) 1 T. R. 276. Bac. Abr. Action C. Danv. 3.

A count in *assumpsit* cannot be joined with a count in any other form of action: thus, *assumpsit* and case for a tort, cannot be joined. 1 T. R. 276. 1 Vent. 386. R. Carth. 189, nor *assumpsit* and trover. 1 T. R. 277. 2 Lev. 101. 3 Lev. 99. 1 Salk. 10. 3 Wils. 354. Sid. 244. 12 Mod. 73; nor *assumpsit* and debt, because the judgment

are different ; nor assumpsit and covenant &c. because the counts are of a different nature. Several counts in assumpsit, however, may be joined in the same declaration, provided they be not for the same cause of action ; but counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." Reg. Pl. H. 4 W. 4, l. s. 5. "So counts for not *giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered and for the price of the same goods to be paid in money, are not to be allowed." Id. "So counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed." Id. "But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money or otherwise, are to be considered as founded on distinct subject matters of complaint, for the debt and security are different contracts, and such counts are to be allowed." Id. "Two counts upon the same policy of insurance are not to be allowed ; but a count upon a policy of insurance, and a count for money had and received to recover back the premium upon a contract implied by law, are to be allowed." Id. "Two counts on the same charter-party are not to be allowed ; but a count for freight upon a charter-party, and for freight pro rata itineris upon a contract implied by law, are to be allowed." Id. And "where several debts are alleged in indebitatus assumpsit to be due in respect of several matters, as for example, for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts." Id. "Provided that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts." Id.

Debt on bond and on a *mutuatus* may be joined. 1 Vent. 366. Cro. Car. 316. So debt for rent upon several leases. 8 Co. 87 b. See Danv. 3. So debt for rent on a lease, either by parol or indenture, and for goods sold and delivered, may be joined in the same action. Bro. Joinder in Action, 90. Gilb. C. B. 5. So, debt on bond and on judgment, 1 Lutw. 43, or on a judgment and on *mutuatus*, 1 Wils. 246.

2 Saund. 117 c. (n. 2.), or for an amercement and on a *mutuatus*, 2 Brownl. Ent. 83, 84. 2 Wils. 248. 2 Salk. 772, may be joined. So may a count in debt, and one in detinue, be joined; Bac. Abr. Action, C. Reg. 95. 139. 2 Saund. 117 b. (n. 2.); although this is an anomaly, and an exception to the above rules, as debt and detinue require different judgments. See 5 Mod. 92. But debt and account cannot be joined; Bro. Joinder in Action, 97; nor debt and trespass; Id; nor debt and assumpsit. Supra. Reg. Pl. H. 4 W. 4, l. s. 5, "two counts on the same charter-party are not to be allowed; but a count for freight upon a charter-party, and for freight *pro rata itineris* upon a contract implied by law, are to be allowed." "Counts upon a demise, and for use and occupation of the same land, are not to be allowed." Id.

A count in covenant cannot, it should seem, be joined with a count in any other form of action; not with debt or detinue, because the judgments are different; not with assumpsit, because the counts are of a different nature; and not with trespass &c. because the one is *founded on contract, the other on tort. But there may be counts in covenant upon several deeds; see Cro. Jac. 329. 1 Lev. 110; although this is very unusual in practice.

A count in detinue may be joined with a count in debt, as above mentioned; but detinue and trover cannot be joined; Willes, 118, nor detinue and any other form of action, because the judgments are different. But there may be several counts in detinue for different causes of action, as for instance, one for detinue of charters, and another for detinue of chattels, or the like. Th. D. l. 10 c. 15, s. 6.

A count in trespass cannot be joined with a count in any other form of action, because the judgments are different. Thus, for instance, trespass and case cannot be joined; 1 L. Raym. 273, 274. 2 Saund. 117, c (n. 2.) See Alleyn, 9. Lutw. 1526. 1 Show. 180. Carth. 118. 5 Mod. 91; nor trespass and ejectment; ante, p. 157; nor trespass and replevin. But there may be several counts in trespass, for several trespasses, at several times and places: 8 Co. 87 b. 3 H. 6. 53 [52.] Th. D. l. 10, c. 15, s. 21, 22, 23. Jenk. 211. 3 Lev. 93. T. Raym. 233: as, for instance, one for breaking and entering his house and taking away his goods, and another for the battery of his servant *per quod servitium amisit*; Alleyn, 9. Sty. 203. 2 L. Raym. 274. Str. 635; or one for breaking and entering his house, and another for debauching his daughter *per quod servitium amisit*; 2 New Rep. 476; one for a forcible entry, another for a forcible detainer. Th. D. l. 10, c. 15, s. 19. and see 39 E. 3, 25. But several counts in trespass,

for acts committed at the same time and place, shall not be allowed. Reg. Pl. H. 4 W. 4, l. s. 5.

A count in case and a count in trover may be joined. 2 Wils. 319. 1 Vent. 213, 365. 1 T. R. 277. 1 Lutw. 98—101. Cro. Car. 20. 3 Wils. 348---354. 1 New Rep. 43. 6 East, 333. But case cannot be joined with a count in any other form of action. *Vide infra*. There may, however, be several counts in case: as, for instance, one for words, and another for a malicious indictment; Hob. 6; or several counts for several disturbances &c.; Th. D. l. 10, c. 15, s. 15; or several counts for several acts of conspiracy. Th. D. l. 10, c. 15, s. 11. But "in actions of tort for misfeasance, several counts, founded on varied statements of the same duty, are not to be allowed." Reg. Pl. H. 4 W. 4, l. s. 5. And "in the like actions for nonfeasance, several counts, founded on varied statements of the same duty, are not to be allowed." *Id*.

Trover cannot be joined with any other form of action but case. And as to Replevin, you cannot add to it a count in any other form of action, because the judgments for the defendant are different, and also for other reasons. But in replevin you may have several counts upon several distresses, at several days and places. Th. D. l. 10, c. 15, s. 2. 10 E. 3, 508. 29 E. 3, 30 [23.] See Com. Dig. Action, G.

The counts thus joined, however, are considered as distinct as if they had been in so many several actions. 6 Mod. 128. 2 L. Raym. 1034. 3 Salk. 14. Therefore, although it is usual to express in the second and subsequent counts, that the cause of action therein set forth is different from what was stated in the preceding count, (as for instance, that the defendant, in consideration that the plaintiff had bought of him a *certain other* horse for 10*l*. promise &c.; or *that the defendant chased *other* cattle, to wit, forty other sheep &c. of the said plaintiff, &c. and the like) yet this is not absolutely necessary: for the court will not intend them to be different, unless they appear necessarily to be the same. 1 Salk. 213.

In actions by executors, it has been decided that a count upon a contract with the testator, and a count in the plaintiff's own right, cannot be joined. 1 Salk. 10. 3 T. R. 659, 660. Hob. 88. Danv. 4. 2 Lev. 110. 4 T. R. 277, and see 5 East, 150. So a count upon a bond given to the testator, and a count upon a bond given to the plaintiff as executor, cannot be joined. 3 B. & P. 7. 10 Mod. 316. But a count upon an *insimul computassent* with the plaintiff as executor, may be joined with a count for goods sold &c. by the testator. 1 Taunt. 322. 6 Taunt. 453. So a count for goods sold by the plaintiff as administratrix, may be joined to a count upon an account stated with her as

administratrix; 6 East, 405; or a count for money paid by her as administratrix, to the defendant's use, to a count on promises to the testator; 3 East, 104; or a count for money had and received by the defendant to the use of the plaintiff as executor, to a count for money had and received by him to the use of the testator. 3 T. R. 659. But where a count upon an account stated with the plaintiff, did not say "as executrix" &c., but merely styled the plaintiff executrix &c., it was holden that it could not be joined to counts on promises to the testator; because evidence of an account stated with the plaintiff in her own right, would have supported the count. 5 East, 150. The criterion, it is said, in these cases is, whether the money, if recovered, will be assets or not, in the hands of the executor; 1 Taunt. 322. 6 Taunt. 456, 457. 6 East, 405; yet it may be worthy of consideration whether a cause of action, for which an executor has an option of suing, either as executor or in his own right, should be joined with one for which he must sue as executor; for, supposing he should fail in his action, suing for the former cause of action he would certainly be liable to costs, for the latter probably not, as the court or a judge thereof might, by rule or order, exempt him. See 3 & 4 W. 4, c. 42, s. 31. 2 Arch. Pr. C. B. [26] 137. 2 Saund. 117 d. (n. 2.)

So, a man shall not be charged as executor, and also in his own right in the same action; because the judgment in the one case would be *de bonis testatoris*, in the other *de bonis propriis*. 2 Lev. 228. Semb. Moor, 419. R. Hob. 88. Adm. Cro. El. 406. Therefore a count for money had and received by the defendant as executor for the plaintiff's use, or for money lent him as executor, or on an *insimul computassent* of money due from him as executor, [where the cause of action originated with the executor after the death of the testator, 7 Taunt. 580,] or the like, cannot be joined to a count on a promise by the testator. 4 T. R. 347. 1 H. Bl. 108. 2 B. & P. 424. 3 Barn. & Ald. 101. See 10 East, 313. But a count on an account stated with an executor for money due from the testator, may be joined to a count on a promise by the testator. 1 H. Bl. 102.

A count for money had and received by the defendant, as executor, to the use of the plaintiff, cannot be joined with a count on an account stated by the defendant as executor; for, on the first count the defendant is personally liable, on the latter not. *Ashby v. Ashby*, 7 B. & C. 444.

Where the same persons are assignees of two bankrupts under separate commissions, they cannot join a count for a joint debt due to both bankrupts, with counts for separate debts due to each; 3 T. R. 433; but they may sue as assignees of both bankrupts, for the *joint debt

alone. 3 T. R. 779. Also, it has been holden that in an action by an assignee of a bankrupt, counts for money lent to and paid for the defendant, by the plaintiff, an assignee of J. S., might be joined with counts for money had and received for him and on an account stated with him as such assignee, although for the causes of action in the first two counts, the plaintiff might have sued in his own right. 5 M. & S. 294.

Where, however, an action is brought against two or more, the plaintiff cannot declare against one in one count, and another in another; as against one for an assault, and against another for taking his goods; or the like. Sty. 153.

A misjoinder of counts is a defect in substance, and may be taken advantage of by general demurrer, motion in arrest of judgment, or writ of error; 4 T. R. 347. 1 H. Bl. 108. 2 B. & P. 424. 5. East, 150, and see 1 M. & S. 355. 1 New Rep. 43. 6 East, 333. 6 Taunt. 179; or it seems by plea in abatement. Com. Dig. Abatement, G. 4. Where there is a misjoinder, however, as assumpsit and trover for instance, and a general verdict given, it may be remedied by entering the verdict on the count in assumpsit or the count in trover: MS. E. 1814. 2 M. & S. 533; or if several damages be given on each count, it may, it seems, be remedied by taking judgment upon one count, and entering a *remittitur damna* as to the other. Brownl. 235. Hob. 249. Yet where the jury in such a case found for the plaintiff upon one count, and for the defendant upon the other, the court held that the misjoinder was not thereby cured. 3 Lev. 99, and see 2 Lev. 101. And it cannot be cured by entering a *nolle prosequi* as to one of the counts, after a demurrer for the misjoinder. 1 H. Bl. 108. See 2 Arch. Pr. C. P. 255.

SECT. V.

Defects in a Declaration, in what Cases aided.

By the Bar.] If the count want time or other circumstances, it may be aided by the defendant's bar: R. 8 Co. 120 b. [Doct. Pl. 279:] as if the count omit the time of the adjudication upon which it is founded, and the adjudication be confessed by the bar, it is aided. R. Lutw. 487. R. Noy, 9. So in assumpsit to pay when he receives money, without alleging when or from whom, it will be aided by the plea of *non assumpsit*. R. 1 Mod. 169. So in an action of slander, for saying "you are foresworn," without saying in what court; if the defendant justify,

for that he took a false oath at the sessions, the omission is cured. R. Cro. Car. 288. [So, where the plaintiffs in their replication stated that C. "sued them at law, without shewing in what court, or in what manner, the court held that it was cured by the rejoinder, which admitted that the plaintiffs had been sued. 1 Lev. 194, 195. 1 Saund. 117. (n. 5.) So where a declaration omitted to state when a release of an equity of redemption was executed, or how the equity of redemption was released, and the defendant pleaded over, the court held that it was thereby cured, although it would have been ill on demurrer. 1 Salk. *171. L. Raym. 662. So, other defects in form are aided by the defendant pleading over]: as in assumpsit to perform an award, if the plaintiff do not shew specially a performance on his part, and the defendant instead of demurring, pleads "no such award," he thereby waives the other matter, and cannot afterwards take advantage of this defect in the declaration. R. Cro. Car. 285. R. Lutw. 353. So in an action by an administrator *durante minori etate* of an executor, for an escape, if it be not averred that the executor is within the age of seventeen, and the defendant plead a removal by *habeas corpus* which is the same escape; he shall not afterwards, take exception for the want of the averment, for he admits by the plea that the plaintiff has authority to sue. R. Lutw. 632. So, in an action for rent, without saying how much is due or on what contract, if the defendant plead payment, he cannot afterwards make the uncertainty of the declaration a subject of objection; R. 2 Cro. 668; and the same in debt on bond, if the defendant demand over and plead payment. R. Cro. Car. 209. [So, when a bond or other deed is pleaded, without stating either expressly, or by some word of art equivalent thereto, that it was sealed (see ante, p. 132), and the defendant admit by his plea that it was sealed, either expressly or impliedly, as by craving over of "the said writing obligatory," or the like, the omission is thereby cured. Cro. Car. 209. Com. Rep. 140, and see 1 Saund. 291 a. (n. 1)]. So, in debt for an escape on a commitment in execution, without saying *prout patet per recordum*; if the defendant plead a licence from the plaintiff, he thereby admits the commitment. R. 3 Lev. 393. [So in *quare impedit*, if the declaration omit to state the next turn to be the plaintiff's, it is cured by the defendant's pleading over. 2 Str. 925.] So, in covenant, if the defendant plead *non est factum* only, this aids a breach badly assigned; for the defendant admits the breach if the deed were his. R. 2 Cro. 370. [So in trespass *quare 100 cataractus aut fearur' prostravit*, if the defendant justify, the uncertainty is thereby cured. Fortesc. 377. In short, in all cases of omission or defects in matters of form merely, they are cured by stat. 27 El. c. 5, s. 1, unless specially assigned as cause of

demurrer. See also 4 Ann. c. 16, and post, Ch. 7, tit. Demurrer.] But if the count be defective in substance, the bar cannot make it good. D. 8 Co. 120 b. As in an action for words "Thy father" &c., without saying that the plaintiff was present, or that the speaking was to him; though the defendant justify, and thereby acknowledge the words, this does not aid the declaration. R. Cro. El. 416. So, if an avowry, which is in the nature of a count, shew a grant of a rent for life out of an estate for years; though the plaintiff in his bar shew that the grant was out of a freehold, it does not aid the avowry. R. 7 Co. 25 a. Com. Dig. Pleader, C. 85.

By the Verdict.] Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, (and without which it is not to be presumed that either the judge would direct the jury to give, *or the jury would have given, the verdict), such defect, imperfection or omission is cured by the verdict, by the common law; or in the phrase often used on the occasion, such defect is not any jeofail after verdict. 1 Saund. 228 a. and see 3 B. & A. 392. Cro. Car. 497. T. Raym. 487. Carth. 304, 389. 1 Mod. 292. 1 Lev. 308. 1 Vent. 109. 1 Sid. 423. 1 Salk. 365. Com. Rep. 116. 6 Mod. 302. 2 L. Raym. 1080. Holt, 567. 3 Wils. 275. 7 Br. Parl. Ca. 555. Doug. 658. 1 T. R. 141, 145, 545. 3 T. R. 25, 147. 4 T. R. 472. 7 T. R. 518, 523. 4 Bing. 648. 2 Arch. Pr. C. P. 271, 273. Thus, in debt for rent by the grantee of a reversion (previously to the stat. 4 Ann. c. 16. s. 9, which rendered attornment unnecessary), if attornment were not alleged, yet it was aided by verdict; for if it were not proved, the plaintiff would have been nonsuit. R. T. Raym. 487. T. Jon. 232. [2 Show. 233, 234.] So, formerly, the omission of a place where a lease was made, was aided after verdict. R. 2 Rol. 66, where the issue was on a collateral point, whereby the lease was admitted. See ante, p. 106. So, in an action on the case against a sheriff, if the plaintiff allege that the sheriff *potuit arre-
tate* A. against whom the writ was delivered to him, though he do not say that he was in his presence &c., it shall be aided by verdict. R. T. Jon. 40. So, an allegation of a right to elect, for 200 years and more, is sufficient after verdict, though it be not said *from time whereof &c.* R. T. Jon. 145. So, in assumpsit, reciting that the defendant had sold to him all the furzes growing upon such land, to be taken before the 10th Aug., the defendant in consideration &c. promised that the plaintiff should not be disturbed in carrying them away, and stating a disturbance; but it was not said that he was disturbed before the 10th

Aug. : yet this was holden to be aided by verdict. R. Cro. Car. 497. So if the plaintiff declare against an executor, on an assumpsit to pay 50s. when he receives money, and aver that he received money, without saying that he received 50s. it will be good after verdict. R. 1 Mod. 169. So, in assumpsit to pay the costs in such a suit, if the plaintiff do not shew how much the costs amounted to, it is aided after verdict. R. Cro. El. 276. [So, the omission of an averment of performance of a condition precedent, is it seems aided by verdict. 2 Bur. 899. 1 Saund. 288 b. Sed. qu. So in an action for a malicious prosecution, if the declaration do not allege the prosecution to be at an end, it is aided after verdict. 1 Saund. 228. 1 Sid. 15]. So, in an action on the case for not bringing goods sold to the common beam, if it be not said that the goods were sold by weight, it shall be aided after verdict. R. per 3 J. 3 Mod. 162. Carth. 7. In assumpsit in consideration that he assigned goods, taken in execution, to the defendant, to pay the plaintiff *de et ex bonis prædictis* all his interest and costs ; if he do not aver that he has raised the money *de et ex bonis*, it shall be aided after verdict for the plaintiff. R. 1 Show. 308. In assumpsit by an indorser against the drawer, if the declaration allege that B. paid the money on the part of the plaintiff, without saying to whom, after verdict for the plaintiff it shall be intended that the payment was to an indorsee, and not to a stranger, R. Carth. 130. So, in debt for rent for three years, on a demise for a year *et sic de anno in annum*, without saying that he continued in possession for three years, yet it *shall be so intended after verdict. R. 1 Sid. 423. So in assumpsit by an executor, if the declaration do not negative a payment to the testator, it shall be aided after verdict. R. 1 Vent. 119. R. Hardr. 221. So, on an assumpsit by A. and B., where the action is brought against A. the survivor, if the plaintiff do not aver that B. did not pay, it is aided after verdict. Per Hale, Hardr. 221. So in covenant by an executor for rent in the *detinet*, if he do not shew whether due before or since the death of the testator, it shall be aided after verdict ; for being in the *detinet*, it shall be intended before his death. R. 1 Sid. 376. [So, where a grant of a reversion or other thing lying in grant, is pleaded, but not alleged to have been by deed, if the grant be put in issue and found by the jury, the omission is cured by the verdict. Hut. 54. 10 Mod. 301. 1 T. R. 145. So if the crown in *quare impedit* do not allege presentation, it is cured by verdict. 2 Str. 1006. So, in an action of debt in a manor court for an amercement, if the declaration do not shew that the defendant was resiant at the time of the amercement set, it is aided by verdict Hardw. 116.] So in rescous of goods, without saying what goods, it shall be aided by a verdict finding two horses. Owen, 123. So in tro-

ver against husband and wife, alleging a conversion *ad usum ipsorum*; if the verdict find the wife not guilty, this aids the declaration; R. March. pl. 134; and the same in an action for words by both. R. 1 Rol. 781, l. 50. So in assault and battery by husband and wife for the battery of both, it will be aided, if the verdict find the defendant guilty only of a battery of the wife. R. 2 Mod. 66. 2 Lev. 101. So in trespass by husband and wife, for a battery of the wife, and taking the goods of the husband, if the defendant be found not guilty as to the goods, the declaration is aided. Dub. 1 Lev. 3. Per 2 J., but 2 J. cont. Palm. 339. [So in an action on st. 9 Ann. c. 14, if the parish where the offence was committed be not specified, it is cured by a verdict finding that the defendant owes &c. to the poor of the parish of A. 4 Bur. 2018.] In assumpsit to pay, if the plaintiff drain land, *ita quod* it be dry *aliquo tempore* between such feasts; if the plaintiff allege that it was dry *aliquo tempore*, where it should be *toto tempore*, it shall be aided after verdict for the plaintiff. Semb. 2 Rol. 246, l. 30. In assumpsit for money received by the defendant for the plaintiff "to the use of the defendant," it shall be good after verdict; for the words "to the use of the defendant," being repugnant and insensible, shall be rejected. R. 1 Salk. 24. So, if the declaration shew a title imperfectly, it may be aided by verdict: as if the plaintiff say that he is *tenens custom' qui tenet tenementa &c. parcell' manerii per cop' rotulor*, without saying *ad voluntatem domini*, it shall be intended after verdict that he was a copy-holder. R. 1 Salk. 365. [The distinction upon this subject is, that a verdict cures a defective statement of a good title, but not a defective title, Plowd. 202. 1 Salk. 365, or the omission of title. Doug. 683. In trespass by a master for beating his servant, omitting *per quod servitium amisit*, this is not cured by verdict, because the *per quod* is the gist of the action. 1 Bulst. 163. So in trespass for keeping a bull accustomed to run at persons, omitting to say that the defendant knew he was so accustomed, the omission is not cured by verdict, because the *sciens* is the gist of the action. 2 Salk. 662. *Say. 282. So in an action on a bill of exchange against the indorser, where notice to the defendant of non-payment was not alleged, the omission was holden not to be aided by verdict; because without this averment of notice, the declaration stated no ground of action. Doug. 679, see 1 T. R. 141. 2 Bur. 899. So in assumpsit, if the consideration appear to be illegal upon the face of the declaration, it cannot be aided by verdict. 2 Bur. 924.] So if the consideration for the promise be omitted, it is not aided by verdict. R. 1 Salk. 364; and the same in all other cases, where the declaration states no cause of action. So, if the verdict falsify the declaration, the plaintiff shall not have judgment: as, in con-

spiracy, if it find all but one not guilty. 1 Saund. 230. Com. Dig. Pleader, C. 87. In trespass, omitting to state the time when the trespass was committed, is aided by verdict. Carth. 389. 2 Salk. 622. 5 Mod. 287. In case against the sheriff for removing goods taken in execution before the landlord was paid a year's rent, omitting to aver notice to the sheriff of the rent due, is aided by verdict. 1 Str. 212. In assumpsit for not delivering a quantity of malt, it was averred that the plaintiff was ready and willing to pay for the same, but it was omitted to state that he offered to do so; and the omission was holden to be cured by verdict. 1 East, 203.

We have now stated the different cases in which a declaration is aided at common law; as to the cases in which it is aided by the statutes of jeofails, see 2 Arch. Pr. C. B. 278; and as to the cases in which it may be amended, either at common law, or by the statutes of amendments, see Id. 277, 278.

Declaration, good in part.] If a declaration in which damages are demanded, be certain for part, and uncertain for the residue [it not being for an entire demand,] if there be a demurrer to the whole declaration, the plaintiff shall have judgment for that part which is good, and shall release his damages for the other part: as in an action against a hundred on a robbery of his money, and of goods in his custody, (not saying what goods,) if the defendant demur to the whole, the plaintiff shall have judgment for the money, but not for the goods. R. 2 Saund. 379. So in debt on the statute of usury, on a corrupt agreement for 40*l.*, and on another for 20*l.* (not saying that the latter was corrupt,) if the defendant demur to the whole, the plaintiff shall have judgment for the 40*l.* R. 2 Cro. 104. 1 Saund. 286. And the same, if the defendant plead to the whole. R. 2 Cro. 104. So in debt against an executor on a bond and on simple contract, it was holden good for the bond, 2 Cro. 104, 105, [but not as to the simple contract; for debt on simple contract did not at that time lie against an executor. 9 Co. 27. Cro. El. 600. Cowp. 375. See now 3 & 4 W. 4, c. 42, s. 14.] So in replevin, if the defendant avow for so much rent, part of which is not due, it shall be good for the residue. 1 Saund. 286. 11 Co. 45 b. R. Moor, 281. Com. Dig. Pleader, C. 32, and see further upon this subject, Bac. Abr. Pleas, B. 5, s. 6.

CHAPTER II.*PLEAS IN BAR.****SECT. 1. *The Commencement.*****2. *The Statement.*****1. *The Matter to be stated.*****2. *The Manner of stating it.*****3. *The Conclusion.*****4. *Sham Pleas.*****5. *Double Pleas.*****6. *Pleas by different defendants.*****7. *Defects in Pleas, in what Cases aided.*****SECT. I.*****The Commencement.***

ALTHOUGH in the regular order of pleading, pleas to the jurisdiction and in abatement are classed before pleas in bar; yet as the latter alone have reference to the merits of the action, the former leading to collateral issues merely, we shall, for the sake of perspicuity, first treat of pleas in bar, and reserve the consideration of pleas to the jurisdiction and in abatement to a subsequent Chapter.

A plea in bar is either the general issue, or a special plea. In both cases, the commencement of the plea is thus:—

*“ In the [King’s Bench,” “ Common Pleas,”
or “ Exchequer of Pleas.”]*

The 5th day of July, 6 Will. 4.

S. } *The said defendant, by A. B. his attorney [or in person] says*
ats. } *that [so stating the matter of the plea.]*
N. }

The Title, &c.] By Reg. Pl. H. 4 W. 4, I., s. 1, every pleading shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date.

Formerly, the plea commenced with an appearance and defence by the defendant, and an *actionem non* or allegation that the plaintiff *ought not to have or maintain his action against him. But now, by Reg. Pl. H. 4 W. 4, l. s. 10, "no formal defence shall be required in a plea, and it shall commence as follows: '*The said defendant, by his attorney*' [or *in person,* &c.] '*says that.*" And by s. 9, in a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non* or to the like effect, or any prayer of judgment; and all pleas pleaded without such formal parts as aforesaid shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action; provided that nothing herein contained shall extend to cases where an estoppel is pleaded.

In the commencement of the plea, however, it should appear whether the plea be intended as an answer to the whole declaration, or to part only: and if the latter, it should specify what part, expressly and with certainty: thus, "And, as to the said first count of the said declaration, he the said J. S. says that" &c.; or "As to the said assaulting, beating and ill-treating the said G. H. by him the said J. S. above supposed to have been done, the said J. S. says" &c.: or "As to the said breach of covenant first above assigned;" and the like. In debt for rent for several years, if the defendant say *quoad* 20l. parcel of the said rent, *nil debet*, without showing when the 20l. was due, it is bad. 1 Sid. 338. and see Lutw. 341. So, where the general issue is pleaded to part, it must specify to what part: thus, "As to all the said several supposed promises and undertakings in the said declaration mentioned, except as to the sum of £——, parcel of the said several sums of money in the said declaration mentioned, the said J. S. says" &c.; or, in trespass, "As to the coming with force and arms &c., and whatever else is against the peace of our Lord the now King, and as to all the supposed trespasses in the said declaration mentioned, except as to" &c. If a plea commence as an answer to the whole declaration, and in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur; 1 Salk. 179. 1 L. Raym. 231. Gilb. C. B. 157, 158. 1 Str. 303. 2 Ro. Abr. 104. N. pl. 1; but if on the contrary it begin as an answer to part only, it is deemed an answer to that part only, although it may contain a legal defence to the whole declaration. See 1 Saund. 28 (n. 3) and the authorities there cited; and see post, p. 173.

The rule H. 4 W. 4, that a plea pleaded in bar of the whole action generally, need not commence with *actionem non*, nor pray judgment, applies to a plea answering the whole of one count, though there are

other counts which it does not answer. *Bird v. Higginson*, 2 Ad. & E. 696.

Where to a declaration in trespass for assault and false imprisonment, containing six counts, the defendant pleaded several special pleas, each to the whole cause of action, and each enumerating all the trespasses, pleading merely one act of justification, namely, an arrest under a *ca. sa.*, concluding with a *quæ sunt eadem*, &c.: On special demurrer, the court held the pleas bad, as each plea purported to be an answer to all the assaults, &c., and was in effect only an answer to one. *M'Curdy v. Driscoll*, 3 Tyr. 571.

Where pleas were pleaded to the first count of a declaration, and a certain part of the second, but were in fact no answer to a certain part of the first count: the court held them bad on demurrer; but gave the defendant leave to amend on payment of costs. *Crumph v. Adney* 3 Tyr. 279, 270.

Oyer.] We have already stated in what cases deeds must be pleaded with profert. See ante, p. 133—137. First, then, it may be deemed a general rule, that in all cases where a party pleading a deed is obliged to make profert of it, the other party may crave and shall have oyer. Secondly, if he plead a deed with profert, where he was not compellable to do so by the rules of pleading, the other party shall not crave or have oyer. 2 Salk. 497. 1 T. R. 149. And Thirdly, if a party plead a deed without profert, where a profert was necessary, yet the other party cannot crave or have oyer. Oyer is never granted of a record; 1 T. R. 149; and what is mentioned in the year-books, Brook's & Fitzherberts's Abridgments Comyn's Digest and other books, of oyer being granted of records, must be understood with reference merely to the proceedings upon a trial by the record, where a record of the same court is pleaded; in which *case the plaintiff, instead of replying *nil-tiel record*, may demand of the defendant a note in writing of the term and number of the roll whereon such judgment or matter of record is entered or filed, or in default thereof the plea is not to be received, and the plaintiff may sign judgment. See 2 Arch. Pr. B. R. 39. It has been accordingly ruled that a defendant cannot have oyer of letters-patent, even although pleaded with profert; 1 T. R. 149; nor of a private act of parliament; Doug. 476, 477; nor of a recognizance; R. Poph. 202; nor of an original writ, 1 Doug. 227. Barnes, 340. 7 East, 383, or writ of resummons; 3 H. 6. 56; nor of the precept or warrant of a justice of peace. 21 H. 6, 5 b. Bro. Oyer. 13. So oyer cannot be craved of a note or other instrument not under seal; R. 1 Salk. 215; nor of a demise to a stranger, where the party pleading it was neither party nor privy to it. 3 H. 6. 46. So, in *scire facias* on a

recovery of an annuity by deed, the defendant cannot demand oyer of the deed ; for the *scire facias* is founded, not on the deed, but on the judgment. Bro. Oyer, 1. 32. So in debt on bond, were upon praying oyer of the condition it appears to be a bond conditioned for the performance of covenants in a certain indenture, the defendant cannot then pray oyer of the indenture, but must set it out himself, and make it a part of his plea. 1 Saund. 8. 1 Sid. 308. ante, p. 137. Co. Ent. 130—134. Lib. Plac. 141. 209. Lil. Ent. 115. 118. 1 Saund. 52. 2 Salk. 498. Even when you crave oyer of a bond, the other party is not thereby bound to give you oyer of the condition, unless you crave that also. 6 Mod. 237. but if there be a condition or other matter indorsed on a deed, and which was indorsed before execution, oyer must be granted of the indorsement as well as of the deed. Id. Of a deed inrolled, although *quasi* a matter of record, the defendant is entitled to oyer, either of the deed itself, or of an exemplification of the inrollment, according to the terms of the profert. 1 H. 7. 29. Doct. pl. 271. ante, p. 138.

Where the defendant sets out on oyer a deed upon which the declaration is framed, he cannot on demurrer take advantage of a variance in an immaterial part between the deed as stated in the declaration and as set out on oyer. *Ross v. Parker*. 1 B. & C. 358.

But although a party be entitled to oyer, yet it is in general optional with him whether he demand it or not. 2 Lil. Reg. 226. Except that, in debt on bond, the defendant cannot plead performance of the condition of it, without craving oyer, Bro. Oyer, 16, 25, see 6 Mod. 303. 154, unless the condition have been set forth in the declaration, which, however, is very unusual. Also, in debt on bond conditioned for the performance of covenants in another deed, the defendant, in order to plead performance &c, of the covenants, must first crave oyer of the condition of the bond, and set it out in *hæc verba* ; and then state the whole substance of the deed containing the covenants, and make profert of it ; and, lastly, plead performance. 1 Saund. 8. 10. (n. 1.) 2 Id. 410. (n. 2.) 1 Sid. 50. 97 425. 1 Vent. 37. Alleyn, 72. Carth. 5. Or if a party plead a deed, and omit some material part which he should have stated, and which would have been of advantage to the opposite party if he had stated it: the only way the latter can relieve himself is by craving oyer of the deed, and setting it out in his pleading ; for he cannot reply that by the said indenture it was further agreed so and so. Hut. 33. 1 Keb. 513. 1 Str. 227, see 2 Saund. 361. 366. (n. 1.) *2 B. & P. 13. By Reg. Gen. H. 2 W. 4, s. 44, "if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may if he think fit insert it for him ; but the costs of such insertion shall be in the discretion of the taxing officer."

The form of craving oyer of a bond and condition, and of setting it out in the plea, is thus : " And the said defendant, by A. B. his attorney, craves oyer of the said writing obligatory, in the said declaration mentioned, and it is read to him, &c. ; he also craves oyer of the condition of the said writing obligatory, and it is read to him in these words" [here state the condition, verbatim, as in the bond ;] " which being read and heard, the said J. S. says" [&c. so proceeding to state the matter of the plea. If the wording of the bond itself be material to your defence, you may set it out also in *hac verba*. See 1 Saund. 289, 290. If the plaintiff have declared on two or more bonds, you may crave oyer of both, either in the same plea (if the one defence apply to both, see 1 Saund. 289, 290,) or in different pleas ; but if the declaration contain two counts upon the same deed, as for instance in an action upon a policy of insurance against the London Assurance Company, the defendant cannot crave oyer of two deeds. Hardw. 243. Oyer in contemplation of law, must be of the original deed itself, and not of a copy ; and therefore, if it appear upon the face of the record that the defendant had oyer of a copy only, it is error. 3 T. R. 153 n. The form of craving oyer of an indenture, and of setting it out in the plea, is thus : " And the said defendant, by A. B. his attorney, craves oyer of the said indenture in the said declaration mentioned, and it is read to him in these words ;" [here set out the deed verbatim ;] " which being read and heard, the said J. S. says" &c. When it is intended by the plea to impeach the validity of the deed, instead of thus calling it an " indenture," or " writing obligatory," it is usual to name it merely the " writing," or the " supposed indenture" &c. to prevent the party's being concluded, by this acknowledgment of its being a deed, from denying its validity. See ante, p. 132.

The effect of setting out a deed upon oyer, is, that it immediately becomes a part of the previous pleading : as if set out in the plea, the defendant thereby makes it a part of the plaintiff's declaration ; and the like. 1 Saund. 316. Carth. 513. 6 Mod. 27. 237. And therefore if a party, in pleading a deed, misrecite it, the other party may take advantage of it, either by pleading *non est factum* ; or by craving oyer of it and setting it out in *hac verba*, and then demurring generally ; for the deed as set out on oyer, being thus made a part of the same pleading where it is misrecited, the pleading appears evidently inconsistent and false upon the face of it. 1 Saund. 9 a. 316, 317. 1 Salk. 72. 2 L. Raym. 715. Sty. 459. And on the other hand, if the defendant, after craving oyer of a deed, purport to set it forth in his plea, but do not set forth the whole deed, or misrecite it, the plaintiff may either sign judgment as for want of a plea, 4 T. R. 370, or he may by his replication pray that the deed may be inrolled, and procure it to be truly inrolled, and then

demur, for the reason above mentioned. 4 T. R. 371 n. 21 E. *4, 76 a. Doct. Pl. 117. See Com. Dig. Pleader, P. 1 1 Str. 1241. 1 Wils. 97.

Refusing oyer when it ought to be granted, is error; 6 Mod. 128. 2 Str. 1186. 1 Wils. 16; besides, the party craving it cannot be obliged to plead without it. 2 Str. 1186. 1 Wils. 16. See as to the Practice of the Courts at Westminster with reference to oyer, and indeed upon the subject generally, 2 Arch. Pr. C. B. [46]. 219, 220.

SECT. II.

Statement of the Matter of Defence.

1. *The Matter to be stated.*
2. *The Manner of stating it.*

1. *The Matter to be stated.*

The matter of a plea in bar must consist of such facts and circumstances as amount to a complete defence to the action, or to such part of the declaration as it purports to answer. It is not necessary, however, to set forth in a plea either public statutes, see ante, p. 95, 144, or the rules of the common law, ante, p. 96, or general customs, ibid & 129, or matter implied by law, ante, p. 96, and see 2 Saund. 305 a. (n. 13,) or matter apparent to the court, ante, p. 96, or a condition subsequent &c. which goes to defeat the defence; ante, p. 96; and see Com. Dig. Pleader, C. 81; but if the matter of defence be founded on a private statute, see ante, p. 95. 146, or on particular customs which affect the inhabitants of particular districts only (such as the customs of London, and the like,) ante, p. 96, the statute or custom must be recited in the plea; and whether the matter of defence be founded on a public or private statute, or on a general or particular custom, the plea must state all the facts and circumstances necessary to bring it within the statute or custom.

To these prefatory observations, we shall add a few rules or maxims which apply to the subject generally, and shall then proceed to consider this part of our subject more particularly.

First: The matter stated must be triable; Co. Lit. 303 b. and see Com. Dig. Pleader, R. 10; and therefore must consist either of matter of law, which is determinable by court; or of matter of record, which is triable by the record; or of matter of fact, which is triable by the country. 9 Co. 24 b. And if matter of fact be mixed up with

matter of law, so that it cannot be tried by the court or jury, the plea is bad : [see T. Raym. 50. 1 Keb. 125, 164. 1 Lev. 193. 1 Sid. 302. Co. Lit. 126 a.] : as if the defendant plead that A. *licite gavisus fuit bona felon'*, it will be bad ; for the jury cannot determine whether he lawfully enjoyed, nor the court whether he enjoyed. R. 9 Co. 25 a. So, if the condition of a bond be, that he will shew a sufficient discharge of an annuity, and the defendant plead that he shewed a sufficient discharge, it is bad ; for the jury *cannot try whether it is sufficient ; but he should have stated what discharge he shewed, and the court would judge whether in point of law it were sufficient. 9 Co. 25 a. [For the same reasons a plea that he did not enter contrary to the form of the statute of Rich. 2, was holden bad. 31 H. 6, 11, 12. Doct. Pl. 342. but see 27 H. 8, 21.] But although, according to the letter, it may not be triable, yet if the effect of the words represent a matter triable, it is sufficient : as, in an action on a covenant for enjoyment free from arrears of rent ; plea, that he delivered money to the plaintiff *ea intentione* that he should discharge the arrears, will be good, though the intent is not triable ; for it is tantamount to saying that he delivered the money *ad solvendum*. R. 4 Mod. 249. Com. Dig. Pleader, E. 34.

Where in covenant against the assignee of a term, stating that all the right, &c. of the lessee vested in the defendant by assignment, and that afterwards the premises were out of repair, the defendant pleaded in bar that for one period he was possessed of one-sixth part of the premises as tenant in common with A. B., and C., and for another period of one-third as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment : Held that the plea was bad in substance, as it could not be a bar to the whole action ; that it was bad in form also, as it merely confessed that the defendant had possession of part of the premises, and not that he was assignee. Semble, That the defendant should have pleaded in abatement, and should have shown how the other persons became tenants in common with him. *Merceron v. Dowson*, 5 B. & C. 479.

Secondly : The matter pleaded must be an answer to the whole declaration ; Co. Lit. 303 a. Cro. El. 434. 2 Lil. Pr. Reg. 302. 5 T. R. 553. Yelv. 225. 1 Bulst. 116. 1 Saund. 264, 28. (n. 3.) and see Com. Dig. Pleader, R. 9 ; for if every part of the declaration be not answered, it will be a discontinuance for the whole : Thus, in trespass for cutting down 300 trees, if the defendant plead *quoad* all but the entry and cutting down 20 trees not guilty, and *quoad* the entry justifies, but says nothing as to the cutting down of the 20 trees, this is a discontinuance for the whole. R. 4 Co. 62 a. [So in assumpsit for three several sums of 36*l*. if the defendant plead as to two of them only, it is a dis-

continuance. 1 Str. 302. So, in replevin on a taking in two places, if the defendant answer only as to one, it is a discontinuance. R. 1 Salk. 94, 179.] So, in trover for 300 sheep, if the defendant justify *quoad* 296, but say nothing as to the remaining four, it is a discontinuance for the whole. R. Cro. El. 434. see 2 Mod. 259. So, in trespass with horses and sheep, if he justify only with horses, it is a discontinuance. R. Mar. pl. 47. R. 2 Cro. 27. So, in an action on a covenant to provide 200 men, and pay so much for each, if the plaintiff assign a breach in both points, and the defendant plead only as to the providing of the men, and say nothing as to the non-payment, it is bad. R. 1 Lev. 16. So in debt on bond to perform an award, if the defendant plead performance of part only, it is bad. R. 3 Lev. 24. And the same, in account against one as bailiff of his house and goods, if he plead only as to the goods. R. 2 Leon. 195. In trespass for breaking his close and destroying his hop-poles, if the defendant plead *liberum tenementum*, and that he took the hops damage feasant, it is bad, for he does not answer as to the destruction of the poles. R. 2 Mod. Ca. 330. So in trespass for a battery and wounding, if the defendant justify putting him into the stocks, [*quæ est eadem transgressio,*] and say nothing more, it is bad; for that matter does not go to the wounding. R. Cro. El. 268. So, in trespass for an assault and imprisonment, if to all, *præter* the assault and imprisonment, the defendant plead not guilty, and justify *quoad* the imprisonment, without saying any thing to the assault, it will be bad, though there cannot be an imprisonment without an assault. R. 1 Rol. 176, 177. In trespass for entering a close and taking timber, if the defendant make a title to the close, without answering to the timber; it is bad. R. 1 Rol. 406. [So in trespass for cutting down and taking away trees, if the defendant do not answer both to the cutting down and taking away, it is bad. Dy. 35. So in an action on the case against a common bargeman, for goods delivered to him to carry to such a place, if he plead that he was discharged of keeping, without saying of carrying them, it is bad. Hob. 18.] In trespass for driving away his *cow*, if the defendant justify the taking of the plaintiff's *heifer*, it is bad. R. Lutw. 1355. So, in trespass with a continuando *a die M. ad 25 Jul'*, if the defendant justify except *a diem ad 20 Jul'*, it is bad. R. 2 Cro. 27. [but see 2 Camp. 175.] Com. Dig. Pleader, E. 1.

But if the defendant answer the whole in sense, though not in words it is sufficient: as if a bond be to perform all covenants, agreements, articles, &c., and the defendant plead that he has performed all covenants and agreements, it is good, though he omit "articles" for it is included in the word "agreements." R. Cro. El. 255. So in trespass

for an assault, battery and imprisonment, if he justify the trespass and imprisonment, R. 1 Lev. 31, or plead *quoad* the residue of the trespass and imprisonment, it is sufficient; for the word "trespass" goes to the whole. R. 3 Lev. 404. So in trespass *quare clausum fregit et januas rupit et clausum intravit*, if he plead to all but the breaking not guilty, and then justify his entry by process &c. it is sufficient, for the entry is a breaking in law. Semb. Lutw. 1433. R. Latch. 188. So, in trespass *quare clausum fregit* and so many cart loads of timber *cepit*, if the defendant make title to the close, and shew the timber to have been trees there growing, it is sufficient. R. 1 Rol. 406. [So where the part left unanswered is not material, and inserted merely as matter of aggravation, the plea is not thereby vitiated; for answering that which is the gist of the action, will cover the whole declaration. 3 Wils. 20. 3 T. R. 297. 292. Thus in trespass for a battery, *per quod de vita sua desperabatur*, it is sufficient to answer to the battery. 35 H. 6, 45, and see 2 Wils. 313. 3 Bing. 135. So in an action for a battery of his tenants, *per quod cesserunt*, it is sufficient to answer to the battery. 35 H. 6, 45. Doct. Pl. 55.] So, in trespass for an imprisonment till he paid so much, if the defendant justify the imprisonment, it is sufficient, without answering to the taking so much, which is merely aggravation. R. 1 Salk. 408. T. Raym. 469. So, for an assault, battery and menacing, if he justify the assault and battery, without answering to the menaces, (which are merely matter of aggravation) it is sufficient. P. Moor, 705. Com. Dig. Pleader, E. 1.

The defect here mentioned, is aided after verdict by the statute of jeofails 32 H. 8, c. 30. R. 2 Rol. 161. R. 4 Mod. 246. If the plea begin as an answer to the whole declaration, and the matter pleaded be an answer but to part, the plaintiff should demur, if he would take advantage of it; 1 Salk. 179. 1 L. Raym. 231. 1 Str. 303. 5 T. R. 553. 2 Ro. Abr. 104. N. pl. 1; but if it begin as an answer to part only, and be an answer to that part, or even to the whole declaration, (for in the latter case it is a discontinuance as well as in the former,) it is better to take judgment by *nil dicūt* for the part which the plea in its commencement does not profess to answer; for if the plaintiff demur or plead over, the whole action is discontinued. *4 Co. 62 a. 1 Ro. Abr. 487. pl. 10. 1 Salk. 179, 180. 1 L. Raym. 231. 716. 2 L. Raym. 841. 1 Str. 302. 1 Saund. 28. (n. 3.)

Thirdly: the matter of a plea must not be double; that is, it must not constitute two or more distinct defences to the declaration, or to the same part of the declaration, if pleaded to part only. Bac. Abr. Plea, K. 1. 5 H. 7, 7. Doct. Pl. 135. Co. Lit: 303 a 304 a. Hob. 295. As, for instance, if an avowant allege seisin of services in his grand-

father, and also in himself, it is double; for either is traversable, and one had been sufficient. Pl. Com. 140 a. So, if a man allege two continual claims, one by his ancestor and the other by himself; *Ibid*; or two descents in fee; *Ibid*, [see 4 E. 4, 3;] it is double. So, if a man plead a patent as a grant, and also as a confirmation, it is double. R. 1 Sid. 176. So in debt for rent, if the defendant plead that it was a navigable river, and that the plaintiff had no right to demise the toll of it, it is double; R. by 3 J.; Vent. Cont. for one is a consequence of the other. 2 Vent. 68. [So, if the defendant plead *nul tiel arbitrement fait ou deliver a lui*, it is double. Dy. 242 a. 15 H. 7, 10. 5 H. 7, 7. 10 E. 4, 6 b. Or if to debt on bond he plead that the bond was obtained by duress of imprisonment and by menace of imprisonment, it is double. Pl. Com. 140 a 19 E. 4. 4 per Brian. In detinue for a bond, the defendant pleaded that it was awarded that he should keep it, until the plaintiff should make partition of certain lands and pay him 10 marks, and averred that he neither made partition nor paid the money: and it was holden double; for either the non-payment of the money, or the not making the partition, would be sufficient to warrant the defendant in keeping the bond. 21 H. 6. 18. So where in debt on bond, the defendant pleaded payment at the day to A. B. the bailiff of the plaintiff, and averred that the money came to the use of the plaintiff, it was holden that the averment made the plea double. 22 E. 4, 25 a. So, in trespass for assault and battery, if the defendant justify for night-walking, and also for suspicion of felony, it is double. Per Keeble, 4 H. 7, 12, 2. In assise, if the defendant pleaded feoffment in fee with warranty, it was double, unless he concluded and relied upon the warranty. 14 H. 8, 27 a. 18 H. 8, 3 b. L. 5. E. 3, 4. 14. and see Co. Lit. 304. Hob. 29. So in assise, if the defendant said that his father died seised, and that he entered as son and heir; and that he afterwards made a feoffment in fee upon condition, and entered for the condition broken; this was double. Per Vavisor. 1 H. 7, 14 a. So, where the defendant pleaded an imprisonment at C., and that he was detained in prison until he executed a bond at D., these must be considered two several imprisonments, and the plea consequently double. 38 H. 6, 13. Doct. Pl. 136—142.] So, if the defendant plead matter of law, and also matter of fact, as if he say that S. lies within the Cinque Ports, where *breve domini regis non currit*, and does not lie in Com. Cant', it is double. R. Yelv. 13. So if he plead several outlawries in disability of the plaintiff, it is double; for one is sufficient. R. Carth. 9. So, if he plead not guilty as to part, and justify for the same part, it is double. R. 1 Rol. 49. [So if he confess and avoid, and also traverse the same point, it is double. 2 Vent. 212. *3 Mod. 318. Co. Ent. 504.] So if he

plead several matters together, though one be in bar and the other in abatement, it is double. D. 1 Sid. 176. And a double plea is bad, though one matter or the other be not well pleaded: as in trespass, if the defendant plead *molliter manus imposuit* and a release, the plea is bad for duplicity, though the release be not well pleaded; R. 1 Sid. 176. but see Dy. 42 b; and the same, though but one of the several matters be material. Per Dod. Poph. 186. [Qu. vide infra.] Com. Dig. Pleader, E. 2, and see Id. R. 4.

The rule we have been now discussing, extends only to cases where one plea contains two or more defences, but does not preclude a party from introducing several matters into his plea, if they be constituent parts of one entire defence; for though it be true that issue must be taken on a single point, yet it is not necessary that such point should consist of a single fact alone. For instance, the point of a plea may be, that the defendant is entitled to common; but to establish this point, several facts may be necessary; as, that the cattle he has a right to have upon the common must be his own, must be levant and couchant &c. 1 Bur. 316, and see Plowd. 194, a. 2 Lev. 82. 1 Vent. 236. Where two matters are pleaded, but one as a consequence of the other, it does not render the plea double; as if the defendant plead *plene administravit*, and so nothing in his hands, it is not double. Plowd. 149 a. [Dy. 243 b. and see 1 H. 7. 15. 18 H. 8, 4. So in debt for rent, if the defendant plead a levy by distress, and so nothing in arrear, it is not double. 1 H. 7. 16.] So, if one matter be pleaded merely as inducement to the other, it does not make the plea double: Per Holt, H. 10 W. 3 Poph. 186; as, in detinue by a woman, if the defendant plead that she took husband who released, it is not double; for he cannot plead the release of the husband, without shewing that the plaintiff married him. R. Moor, 25. Dal. 30. pl. 9. [So if a man plead an accord by arbitrament, and payment, it is not double. 1 H. 7. 16. So, in *Mort d' ancestor*, a plea that the demandant was seised, and enfeoffed the tenant, is not double. 1 H. 7, 14, and see 4 H. 7, 17. Doct. Pl. 138. So, in assise for tithes, where a prescription and seisin were both alleged, yet as the prescription was merely inducement to the right, and the seisin the effect of it, and as he could not allege one without the other, it was holden not to be double. Dy. 85.] So in debt on bond conditioned to deliver hops, which the plaintiff was to choose; if the defendant plead that he was ready to deliver them, but that the plaintiff did not choose them, it is not double. Semb. March, pl. 113. [So matter which is merely surplusage, shall not make a plea double. Per Fin-eux, 1 H. 7, 16, and see Dy. 42 b. acc.] So it is not double, if one answer be sufficient for the several matters; [Plowd. 194 a. 4 H. 7, 17. Doct. Pl. 146;] as if the defendant allege two descents in tail, it is good; for the

gift is the substance, and *ne dona pas* is an answer to the whole. Pl. Com. 140 a. [4 E. 4, 3. So if the tenant in tail plead a gift in tail and a descent, by the better opinion it is not bad for duplicity, because one answer is sufficient to all. 35 H. 6. 35.] In trespass for an assault, battery and imprisonment, till he paid 7l. fine, if the defendant plead *not guilty as to all but the assault and imprisonment, and then justify by process for the 7l. it is not double; for the taking of the 7l. is not within the not guilty. R. W. Jon. 367. So, it is not double, if one matter cannot be well pleaded without the other, and the defendant relies upon one only: as if two statutes be pleaded for the repeal of a former law, if the one have reference to the other, it is not double. Semb. 1 Rol. 88, 89. So, if a man plead a feoffment with warranty, and rely only on the warranty; Per Berkley, March, pl. 84. ante, p. 174; So if a defendant plead that the principal rendered himself and died, and rely on the death; R. W. Jon. 139; or if he plead *nient alien artificer*, and rely upon his being born within the king's legiance; R. 1 Sid. 357, and see Com. Dig. Pleader, R. 7; and the same, if the defendant plead several matters, and conclude *et sic non est factum*. Kit. 223 b. 224 a. [38 H. 6, 26, 27. Doct. Pl. 142. Com. Dig. Pleader, E. 2.

Duplicity in a plea can be taken advantage of by special demurrer only. 37 H. 6, 6. 2 Ro. Rep. 306. 1 Lutw. 4. 3 Mod. 251. 1 L. Raym. 332. Comb. 65. Poph. 113. 1 Lev. 76. 1 Salk. 219. 2 L. Raym. 798. 2 Salk. 678. 7 Mod. 71. Bac. Abr. Plea, K. 1, N. 6. Co. Lit. 72. Cro. Car. 61. 2 Vent. 68. March. pl. 113. If the plaintiff answer over, Kit. 238 a. 21 H. 6, 14 b, or demur generally, 37 H. 6, 6. R. 1 Saund. 337, 337 b, (n. 3.) R. 2 Rol. 306. Semb. 1 Rol. 112. 1 Wils. 219, and see ante, p. 98, the fault is cured. And if the plaintiff answer over, it is said he must answer both parts. 1 Vent. 272, but see 1 Wils. 338.

What has now been said as to duplicity in a plea, must not be understood as having any reference to several pleas to different parts of the same declaration, or to the same part of a declaration, or to pleas by several defendants; these subjects shall be treated of hereafter, in the 5th and 6th section of this chapter. See as to duplicity in a declaration, ante, p. 98.

Fourthly, Surplusage in a plea shall not prejudice: [1 H. 7, 16. Dy. 42 b. Co. Lit. 303 b:] as, if a defendant in replevin, make cognizance as bailiff to A. administrator of B., where A. ought to distrain in his own right, the words "administrator of B." shall be rejected as surplusage. D. Hob. 208. So, if in pleading a lease for life, the entry of the lessee be pleaded, it may be rejected as surplusage. 11 Co. 52 a, b. and see Doct. Pl. 289, 290. Co. Lit. 212 a. 9 East, 424. Com. Dig.

Pleader, E. 12. See more particularly upon this subject, ante, p. 98. 113, &c.

Having thus stated the rules relating to the matter of a plea, generally, we shall now proceed to consider the subject more particularly. The matter of a defence is either the denial of the cause of action stated in the declaration, or a confession and avoidance of it, or matter of estoppel; and in this order we shall now treat of it.

1. *Denial.*
2. *Confession and Avoidance.*
3. *Matter of Estoppel.*

*1. *Denial.*

A denial of the cause of action, is either express or implied. The express denial or traverse (as it is termed) is either general or special; the implied denial is, when the defendant in his plea sets up a title inconsistent with that which is necessary to support the plaintiff's cause of action, giving at the same time a colourable title to the plaintiff; so that if the defendant's plea be true, it destroys the plaintiff's cause of action altogether. These several species of denial we shall now consider in their order.

General Traverse.] A general traverse is of two kinds: 1st. The general issue, which may be pleaded either to the entire declaration, or to one or more counts of it, or (in actions *ex delicto*) to a part of a count; and is a denial of the cause of action therein stated: and, 2dly, A separate traverse or denial of the several parts of a count.

The general issues are forms of denial long established in pleading: adapted to the different actions, and originally contrived so as to deny all the facts comprised in the declarations or counts, to which they are pleaded. In *assumpsit*, the general issue is *non assumpsit*: in debt on simple contract, "that the defendant never was indebted in manner and form as in the declaration alleged;" Reg. Pl. H. 4 W. 4, II. s. 2; in debt on bond or other specialty, where the deed is the foundation of the action, *non est factum* puts the deed itself in issue; but as the deed declared upon many probably be the deed of the defendant, or of the person under whom he claims, and yet he may not be guilty of the breaches of covenant complained of, in that case he must plead a plea to each of the breaches of covenant assigned in the declaration, denying it in terms. See Reg. Pl. H. 4 W. 4, II. s. 2. In *detinue*, the general issue is *non detinet*. In *trespass*, *case* and *trover*, *not guilty*; in *replevin*, *non cepit*: in *ejectment*, the general issue is *not guilty*: in *dower*, *ne unques seisie que dower*.

And it is a general rule, that a plea which amounts to the general issue, is bad; for in such a case the general issue should be pleaded. Co. Lit. 303 b. 3 Mod. 166. [14 H. 6, 19 a.] As in trespass by a commoner, if the defendant plead that, being lord, he dug in the common for coals, and left sufficient common; the plea is bad, for it amounts merely to not guilty. R. 1 Sid. 106. [So, in trespass, *non depascit herbas* is no plea, for it amounts merely to not guilty. 22 H. 6, 37.] So, in assumpsit, if the defendant plead a bond given for the debt, and traverse that he was indebted *aliter aut alio modo*; R. Cro. El. 201. Semb. 5 Mod. 814; or plead another promise, and traverse the assumpsit *modo et forma*, R. 2 Rol. 350: it is bad, for the same reason. [So, in assumpsit, a plea *quod ipse performavit omni ex parte sua performand*, was holden to amount to the general issue. 1 Salk. 394. 2 L. Raym. 968.] So, in an *audita querela* on a defeazance, if he plead another defeazance, and traverse the defeazance in the declaration, it is bad, for it amounts to *non est factum*. R. Cro. El. 532.

*Where in dower the tenant pleaded that the husband of the demandant held only for life, remainder in tail to his son: the plea was holden bad, because it amounted to the general issue of *ne unques seisie que dower*. 40 Ed. 3, 15. see 39 H. 6, 9. 8 H. 6, 2 b. 3. Doct. Pl. 204 205.] Com. Dig. Pleader, E. 14. There are many other instances to be found in the old books upon this subject, which are now inapplicable, as the law relating to defences which may be given in evidence under the general issue, (upon which must necessarily depend what special pleas amount to the general issue), is now entirely altered by the late rules of pleading, R. H. 4 W. 4, II.; by which the following regulations are made.

I. 1st. In "*assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." R. H. 4 W. 4, II. s. 1. As for example, "in an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given on the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the

effect alleged, but not of the breach. In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff." 2dly. "In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible: in such actions therefore a plea in denial must traverse some matter of fact, as for example, the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note." 3dly. "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: as for example, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded."

II. 1st. In *Debt* on specialty or *Covenant*, "the plea of *non est factum* shall operate as a denial of the execution of the deed in *point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." 2dly. "The plea of '*nil debet*' shall not be allowed in any action." 3dly. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that '*he never was indebted in manner and form as in the declaration alleged,*' and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*." 4thly. "In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

A fraudulent misrepresentation of the legal effect of a deed, by which a party is induced to execute it, cannot be given in evidence on the plea of *non est factum*. *Edwards v. Brown*, 1 Tyr. 182.

III. In *Detinue*, "the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's

property therein; and no other defence than such denial shall be admissible under that plea."

IV. In Case, "the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. As for example, in an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff in his office, profession or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officer, but not of the debt, judgment or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received." 2dly. "All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit."

V. 2d. "In actions of *trespass quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed *the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." 3dly. "In *trespass de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein."

But when the defence consists of matter of law, it may be pleaded specially, though admissible in evidence under the general issue. R. 2 Vent. 285. R. *Hussey v. Jacob*, B. R. T. 8 W. 3. 1 Salk. 344. 2 Mod. 276. Per Holt, Skin. 362, and see 4 Bing. 470. 6 Bing. 197.

[As for instance, that the bill of exchange declared on was given for money lost at play; Carth. 356. 5 Mod. 175. 1 Salk. 344. 1 L. Raym. 87. Comyns, 4. Holt, 328. 12 Mod. 96; so, a release, coverture or infancy, may be pleaded specially in assumpsit, although the defendant may, if he wish, give them in evidence under the general issue. *Id. ibid*] So, in conspiracy, the defendant may plead a legal prosecution, though it amount to not guilty. R. Cro. Eliz. 871. So, if an administrator plead that goods of the intestate of such a value came to his hands, which he detains for his own debt, and that he has no assets *ultra*, it is good, though it amount to *plene administravit*. R. Hob. 127. So, in debt upon a lease for years, entry into part may be pleaded specially, 1 Vent. 2. Also, if the plea be special, for greater certainty, it is good: as, in an action for a trespass in A., if the defendant plead that there are several A.'s, and none without addition, and justify in black A.; this does not amount to the general issue. *Semb.* Lutw. 1492. So, a plea which confesses and avoids the plaintiff's title, is good, though the matter may be given in evidence on the general issue: [Skin. 362, per Holt:] as in trover, if the defendant plead that A. was possessed of the goods and lost them, that C. found them and gave them to the plaintiff, who lost them, and that the defendant found them and by the command of A. converted them. R. Cro. El. 262. R. cont. Latch. 185, for there it is said that every plea in trover, which gives colour to the plaintiff, is bad, because it amounts to the general issue. See Cro. El. 555. 146. 1 Leon. 178. [So, where in an action for trespass by cattle, the defendant pleaded that the plaintiff, in order to have a pretence for suing the defendant, commanded his own servant to drive the defendant's cattle into the plaintiff's land, and that the defendant, as soon as he knew of it, drove them back; the plea was holden good, although it was objected that it amounted to the general issue. 21 H. 6, 39.] So an entire plea is good, though as to part of the declaration it amounts only to the general issue. R. 3 Lev. 40. Com. Dig. Pleader, E. 14.

Where one part-owner of a ship brought an action against another, for money paid to his use and on an account stated, the defendant pleaded that he was part-owner of a sixteenth of the ship, and the action was brought to recover against him one sixteenth of a sum paid by plaintiff as damages for the loss of certain goods which had been shipped on board, but that the loss was occasioned by the negligence and personal misconduct of the plaintiff; and secondly, that the voyage, during which the loss occurred, was undertaken against his consent, and for the advantage and at the risk of plaintiff and others: the court held these pleas bad on special demurrer, as amounting to the

general issue; they were not pleas of confession and avoidance, and, therefore, the matter of them might be given in evidence under the general issue. *Gregory v. Hartnell*, 1 Tyr. & Gr. 303.

Where a special plea amounts to the general issue, it is a defect in form merely, 1 Ro. Rep. 112, 113. 1 Show. 76, 183, see Cro. El. 871. 2 Ro. Rep. 350, and can be taken advantage of upon special demurrer only. Cro. Car. 157. 10 Co. 95. In *Nichols v. Jeames*, (C. B. E. 29 C. 2. Bac. Abr. Plea, G. 3.) however, the *court said that it was entirely in their discretion, where this fault is assigned as cause of demurrer, to give the plaintiff judgment, or to allow the plea to stand; and it is said in Comyn's Digest that it is better in such a case not to demur, but to pray the opinion of the court, (Com. Dig. Pleader, E. 14, cites D. Hob. 127. R. 1 Leon. 178,) that is, to move the court to set aside the plea.

As to the second species of traverse above-mentioned, it is a denial in terms or in substance of a part of a count, the other parts being denied or confessed and avoided by other pleas. As, for instance, in covenant, a denial of one of the breaches assigned, as above-mentioned; so, in covenant by an assignee of a reversion or term, not only the breaches may be traversed thus, but also each branch of the derivative title set forth in the declaration. See Com. Dig. Pleader, R. 3.

Special Traverse.] At the beginning of this section (ante, p. 172.) it was stated to be a general rule that the whole of the material facts in the declaration must be answered by the plea or pleas. It often happens, however, that the cause of action stated in the declaration consists of a number of facts, each so essential to it, that if any one of them can be denied with success, it will be sufficient of itself to destroy the cause of action altogether. In order therefore to enable the pleader to traverse one of these essential facts, without being obliged to traverse the others, and at the same time to obviate any objection arising from the general rule above-mentioned, this special or formal traverse, or, as it is called in the old books, traverse *sans coo*, has been devised. In treating of this subject, we shall consider; 1st, In what cases this traverse may be adopted; 2dly, What may be traversed; and, 3dly, The form of the traverse, and its requisites.

If the plaintiff, in his declaration, set forth a title to the lands in dispute, and the defendant also claim by title, it is clear that if the defendant merely set out his title in his plea, no issue could possibly arise therefrom, however inconsistent it might be with the title of the plaintiff; but the defendant in such a case may state his title in his plea, as inducement, and conclude with a traverse of some single material point of the title alleged in the declaration. See Hob. 103, 104. Lutw. 381,

As if a man make title by feoffment, and the other plead a prior feoffment, he should traverse the feoffment first pleaded. So if the defendant avow for rent granted by A. who was seised in fee, and the plaintiff says that A. was seised in tail and died, and the land descended to him, he must traverse the seisin in fee. *Semb. Dy. 312 b.* [So, if the plaintiff allege a gift in tail to J. S., it is no plea for the defendant to make title by a feoffment in fee from the same J. S., without traversing the gift in tail. *2 H. 6, 15. Doct. Pl. 348.* So, where the plaintiff declares that A. being seised, made a lease to him, and the defendant plead that B. was seised and made a lease to him &c., the plea must traverse the seisin of A., otherwise the seisin of B. shall be intended by disseisin. *1 Sid. 227.*] So if the plaintiff *count of an estate to him and his heirs male, and the defendant plead one to him and his heirs female, he must traverse the estate alleged by the plaintiff. *Yelv. 141.* So if the plaintiff claim a seisin in fee (which shall be intended in possession), and the defendant entitle himself by a lease prior to the plaintiff's seisin (by which it appears that he had a fee in reversion only), he must traverse the seisin of the plaintiff in fee. *Per 2 J. Cro. cont. Cro. Car. 324. 3 Mod. 319.* So if the defendant say that A. being seised demised to him, and the plaintiff reply that before the demise A. enfeoffed him, he must traverse the demise, excepting where he adds an entry and demise, and afterwards a re-entry. *Cro. El. 754.* In partition, if the defendant plead that he is sole seised, he must traverse that he holds *pro indiviso*. *Kit. 229 b. [4 H. 7, 5. 39 H. 6, 19. Doct. Pl. 357, 360.]* If the defendant allege a seisin in himself of a manor, and a fine levied, if the plaintiff reply that he himself was and still is seised, he must traverse the defendant's seisin at the time of the fine. *R. 1 Leon. 77. 1 And. 166. Sav. 86.* So, if he allege seisin in A., by whose command he took damage feasant; and the plaintiff allege that the father of A. was seised and leased for life to B., under whom he claims: he must traverse the seisin of A. at the time of the taking. *Dub. 3 Mod. 318. R. Carth 165.* If the defendant allege seisin in A., who devised to his father in tail, who died seised, and that the defendant entered and was seised, until disseised by the plaintiff; if the plaintiff confess the seisin and devise, but plead a recovery and conveyance to himself, he must traverse the disseisin. *R. Cro. Car. 494. W. Jon. 402. Com. Dig. Pleader, G. 2.*

So, when the defendant alleges a different title in the plaintiff from that which is stated in the declaration, he must traverse the latter. Thus, in debt for rent upon a lease of 10 acres, if the defendant say that the lease was for 10 acres and also a rectory, &c., he must traverse the lease of 10 acres only. *1 Leon. 44. [35 H. 6, 38, 39. So, in debt*

for rent, where the plaintiff declared upon a lease of 20 acres, and the defendant pleaded a lease of 20 acres and of 12 acres more, it was holden that he should traverse the demise of 20 acres only. 32 H. 6, 3 b.] So, if the plaintiff declare on a demise of two chambers, and the defendant plead a demise of two chambers and another room and entry therein, he must traverse the demise of the two chambers only. R. but Saund thought that the traverse would be more proper on the part of the plaintiff. 1 Saund. 207. T. Raym. 170. 1 Lev. 263. [See 1 Saund. 209. (n. 8.) and see Dy. 32 b.] So in replevin, if the defendant claim common in 6 acres, and the plaintiff allege that he had common in 40 acres, he must traverse that he had common in six acres only, for it cannot be intended the same common. R. 1 Leon. 44. So, if the plaintiff allege a seisin in fee, and the defendant state it to be a conditional fee only, he must traverse the seisin in fee alleged, for that must be intended a fee absolute. R. Yelv. 140. So, if the plaintiff allege a seisin till A. died without issue, and the defendant confess an estate till B. died without issue, he must *traverse the estate alleged by the plaintiff, for they are different estates. R. Yelv. 140. [So, where a dying seised in fee is alleged by the defendant, and the plaintiff pleads a dying seised in tail, he must traverse the dying seised in fee. 5 H. 7, 11, 12. In a writ of entry, if the defendant plead that A. was seised in fee and enfeofed him, and the plaintiff say that he was only tenant by the curtesy, he must traverse the seisin in fee. Dub. 30 H. 6, 4. In a *quare impedit*, if the plaintiff make title to an advowson in gross, and the defendant say that a moiety of it is appendant and belongs to him &c., this is no plea without a traverse of the whole advowson being in gross. 35 H. 6, 33, 34.] So, if the plaintiff claim by prescription, and the defendant confess a title by deed, he must traverse the prescription. Yelv. 141. [32 H. 6, 4, 5. So, if one party plead a prescription, and the other plead another prescription inconsistent with it, the latter must traverse the prescription first pleaded; 2 Leon. 209. Yelv. 217. 9 Co. 59. 2 Mod. 104. Carth. 116, and see Lutw. 381; and the same, where one party pleads a custom, and the other replies a custom repugnant to it. 1 Wils. 253.] If the defendant allege seisin of a manor, and justify for a heriot, and the plaintiff reply that B. was jointly seised with him, he must traverse the sole seisin of the defendant. R. 2 Mod. 60. [See Dy. 280.] In trespass, the defendant pleads a lease granted by the master and fellows of a college, if the plaintiff reply that at the time of the alleged demise there were no fellows, he must traverse that the master and fellows demised. Kit. 229 b. So, if he allege seisin in A., and a demise and grant of the reversion to the plaintiff; and the plaintiff confess seisin of a moiety by A. and a demise and grant to the

plaintiff, who granted over to the owner of the other moiety ; he must traverse that A. was seised of the whole at the time of the demise. Com. Dig. Pleader, G. 2.

So, in all other cases, where any material fact is alleged in any pleading, which, if denied, will, upon issue joined, decide the case one way or other, if the adverse party plead a matter inconsistent with, and contrary to, such allegation, he must traverse it. 1 Saund. 22. (n. 2.) Hob. 103. Vaugh. 8. 1 S'd. 301. 1 L. Raym. 41. Yelv. 140. As in an action on the case that the defendant overcharged a warehouse, by means whereof it fell, if the defendant plead that it was ruinous and therefore it fell, he must traverse that it was overcharged. Per 2 J. Manwood, cont. Cro. El. 285. In disceit against an attorney for appearing without warrant, who pleads that he appeared for another defendant only, from whom he had a warrant, he must traverse the covin. R. Dy. 361 b. In an action upon the statute of labourers, and count that the defendant was a vagrant and refused to serve ; if the defendant plead that he was in the service of A. he should traverse his being a vagrant. Kit. 229 a. In debt on bond conditioned to deliver an inventory of all the goods of B., and the defendant says that he delivered an inventory of such and such goods, which were all ; if the plaintiff reply that the defendant had such other goods, he must traverse that those mentioned by the defendant are all. R. Dal. 52. Com. Dig. Pleader, G. 2.

*But where a matter is expressly pleaded in the affirmative, which is expressly denied by the other party, there a traverse is of course unnecessary, a sufficient issue being already joined. 36 H. 6, 15. Cro. El. 755. Lit. Rep. 15. 1 Vent. 101. Bac. Abr. Pleas, H. 1. As if, in assise, the defendant plead a feoffment by a stranger, which he avers to be absolute and without any condition, and the plaintiff reply that it was on condition, a traverse is unnecessary. 2 Ro. Rep. 35. Hob. 71, 72. So, in an *audita querela* to avoid execution on a statute, alleging that *obtulit* the money at the day of payment ; if the defendant plead that at such a day he demanded it, and no one was ready to pay, he should not traverse *absque hoc quod* plaintiff *obtulit*, for there was an issue before ; R. Cro. El. 755 ; but it appears the plea was bad in another point. Yelv. 38. 2 Cro. 13, and see March, 21. Yet, after an affirmative and negative, a traverse may be allowed, in order to take issue upon a single point : as where the defendant pleads another action pending for the same cause ; if the plaintiff reply that there are several actions, *absque hoc* that any of them are for the same cause, it is good. R. on special demurrer, 1 Vent. 101. T. Raym. 199. 1 Mod. 73. Com. Dig. Pleader, G. 9.

So, if the plea confess and avoid the matter of the count, a traverse is in general unnecessary: [6 Co. 24 b. Cro. Jac. 221. Yelv. 151. Cro. El. 161. 2 Lutw. 1560. Carth. 166. Cro. Car. 384. Hob. 104. 1 Saund. 22. (n. 2.) 207 c. (n. 5.)]: as, where the defendant justifies as assignee of a term for years of A., if the plaintiff claim by a prior assignment from A. of the same term, he need not traverse the assignment to the defendant, having already sufficiently confessed and avoided it; for after the assignment to the plaintiff, A. could not assign to the defendant. R. Moor, 551. Cro. El. 650. Per 2 J. 3 cont. Owen, 142. R. per 3 J. 6 Co. 24 b. R. Moor, 557. Dub. 2 Vent. 212. So, if a man claim a copyhold, and the other party claim by a prior grant, he need not traverse the subsequent grant, but the traverse must be of the prior one. R. 2 Cro. 299. Yelv. 221. 2 Bulst. 1. So, if a man claim by patent, the other who has a prior patent need not traverse the last patent, though it be not fully avoided; for by possibility the king might have a new title after the first, and before the subsequent, grant. Per 3 J. Cro. Car. 581. So if the defendant plead that the plaintiff abated after the death of A., and the plaintiff reply that A. devised to him, he need not traverse the abatement. R. Yelv. 151. See Lutw. 1558. Yet if the feoffment of A. be pleaded, and the other plead a prior feoffment from A. he must traverse the last feoffment; for possibly A. might gain a new estate by disseisin after the first feoffment. Dy. 171. Cro. El. 650. 6 Co. 25 a. R. 2 Cro. 681. R. Cro. El. 30. [See ante, p. 181.] So if there be a suggestion in prohibition of a perpetual unity, if the defendant shew that the abbey was founded within time of memory, he need not traverse the prescription, for it is sufficiently avoided; R. Yelv. 31; but otherwise if the land were in the hand of farmers, for then the prescription must be traversed. R. Yelv. 31. So in *quare impedit*, if the plaintiff count that A. being seised in fee, presented B. and granted the next avoidance to him, &c., and the defendant plead that A. being *seised in fee, enfeoffed others to the use of himself for the life of C., and then granted the next avoidance, and that C. died; he need not traverse the seisin in fee at the time of the grant, for he has confessed and avoided it. Dub. Hob. 102. So, in a *scire facias* against terretenants, who plead that the cognizor and others were jointly seised, and that the cognizor died, &c.; if the plaintiff reply a bargain and sale, this avoids the joint seisin, and therefore it need not be traversed. R. 2 Saund. 28. So, in a vovry of a distress for rent of a third part, if the plaintiff in bar entitle himself to the other two parts in common, he need not traverse the taking in the third part only, for he has confessed and avoided. R. 2 Vent. 228. 283. So, in an action for false imprisonment, if the defendant justify under the sheriff's war-

tant upon a *capias*, and that the plaintiff escaped, whereupon he by the same warrant retook him; if the plaintiff reply that he escaped with the sheriff's consent, he need not traverse the second taking. R. 1 Brownl. 197. Com. Dig. Pleader, G. 3. So, if he justify the whole fact, a traverse is unnecessary: as in battery, if the defendant justify by casualty, he need not traverse *aliter aut alio modo*. D. Moor, 864. Cro. El. 667. Com. Dig. Pleader, G. 4.

Yet, if there be not a full confession and avoidance, there may be a traverse, though it be not perhaps necessary: as in replevin, if the defendant avow a distress in two parts of the land, and the plaintiff make title to the fourth of the third part: if the avowant convey to the plaintiff the two parts also, he may traverse that he was seised of the fourth part only. R. Hob. 80. So in *quare impedit*, where the plaintiff counts of a grant from A. seised in fee, if the defendant shew that he was seised only *pur auter vie*, yet he may traverse the seisin in fee; Semb. Hob. 103. Moor, 869; and to add a traverse, is the surest way. D. Moor. 869. Com. Dig. Pleader, G. 3. So, where the declaration charges a publication to A. and others by name, if the defendant justify the publication to A. only, he must traverse the publication to the others; but where the declaration charged a publication to "divers subjects" generally, and the defendant justified the publication to the members of a committee of the House of Commons, the court held the plea good without a traverse. 1 Lev. 240. 1 Saund. 131. 133. (n. 4.) So, in trespass for the taking of four pigs distrained, one after impounding, the others before, if the defendant plead a tender of amends, he must traverse the impounding, for a tender afterwards is too late. R. Lutw. 1262. Also, if the defendant confess and avoid the matter of the count by argument only, he must traverse: as in debt against an executor, who pleads that he is an administrator, he must traverse administration as executor. Kit. 229 b. So, in debt against an administrator, who pleads that he is executor, he must traverse the dying intestate, Kit. 229 a. So, where in an action against an executor, he pleaded that the testator made A his executor, who proved the will, &c., it was holden that he should have traversed *absque hoc* that he himself was executor, or administered as executor. 2 Mod. 168. So, in account against one as bailiff of a manor such a year, if he plead that A. was bailiff that year, he must traverse that he himself was. Dy. 66 b. pl. 15.

*If a man allege matter of law in bar or avoidance of another's title, he need not traverse: as, if the defendant plead a fine to the king and to the heirs male of his body, whereby the king entered and was seised in tail; if the plaintiff confess the fine, and say that the king

entered and was seised in fee, there is no need of a traverse of the seisin in tail, for it is matter of law. R. Plowd. 230 b. So, in trover if the defendant plead a seizure, as prisage, to the king's use, there is no need to traverse the conversion; for he confesses the seizure, and whether it be a conversion or not is matter of law. R. Yelv. 200. So, in trespass, if the defendant plead a sale in market overt, he need not traverse the plaintiff's property; 5 H. 7, 14 a; and the same, if he plead seizure as a waif or wreck. Id. So, to an avowry for rent by prescription, if the defendant plead unity of possession, there is no need to traverse the prescription; for it is matter of law whether unity extinguishes it. Id. So, if the defendant plead that the plaintiff and his blood have been villains time whereof, &c., and the plaintiff reply that he is a bastard, he need not traverse the prescription. Id. So in *quare impedit*, if the plaintiff allege seisin in King Edward, and that he died seised, and the rectory descended, &c., if the defendant plead an appropriation of King Edward, he need not traverse the dying seised. R. Plowd. 496 a. Com. Dig. Pleader. G. 5.

Secondly. As to the matter to be traversed: a traverse should be of some material fact, which upon issue joined will decide the matter one way or other. 1 Saund. 22 (n. 2.) 2 Saund. 5. 28. 6 Co. 24 a. 1 Ro. Rep. 235. Carter, 217. Lane, 18. Comb. 321. Vaugh. 3. Show. P. C. 220, 221. and see Com Dig. Pleader, R. 8. And it should be of the most material fact, and the effect of the adversary's pleading: therefore in debt for rent on a lease for years, if the defendant plead a descent to A., who was disseised by the lessor, but who after the lease, and before any rent due, entered; the plaintiff ought to traverse the disseisin and not the descent. R. Moor, 593. So in trespass, if the defendant plead that A. being seised made a lease to him; and the plaintiff shew that after the disseisin of A., his father was seised, and died seised, and the land descended to himself; he must traverse the lease. R. Moor, 574. 6 Co. 24 a. So, if the surrender of a copyhold into the hands of A., the plaintiff's steward, be alleged the plaintiff should traverse the surrender, and not that A. was his steward. R. Cro. El. 260. So, in *quare impedit*, the most material point should be traversed. R. Lit. 15. R. Cro. Car. 61, 105, 586. R. Vaugh. 10 &c. 56 &c. Lutw. 1630. In trespass, if the defendant plead that the land was demised to A., who set out his tithes, whereupon he as parson took them, the plaintiff must traverse the taking as tithes, and not the demise. R. W. Jon. 89, 90. If the defendant plead a gift to his ancestor, in tail, and several descents, whereby the land came to him; if the plaintiff confess the gift, and allege a feoffment by the donee, under which he claims, and traverse that the donee died

seised, it is bad ; he should traverse the last dying seised, for there might be a remitter. R. Dy. 107 a. Com. Dig. Pleader, G. 10. In trover for a gold chain, which the defendant found, &c., and sold to persons unknown, the defendant traversed the sale, and *the court held it to be a good traverse. Dy. 121. So a traverse of the conversion in trover, in all cases, is good. Per Coke, Cro. El. 97. But in detinue the bailment is not traversable, unless the defendant have confessed a possession by the plaintiff. 34 H. 6, 42. So in trover the loss of the goods by the plaintiff, or the finding of them by the defendant, is not traversable. The consideration in assumpsit is traversable, if executory ; D. Cro. El. 201. Hob. 103. 1 Rol. 43. but otherwise if the consideration be executed. Ib. ibid. R. 1 Rol. 401. So if the defendant in trespass plead *molliter manus imposuit*, it is traversable. R. Lutw. 1436. Where both parties make title by the same person, the conveyance is traversable. D. 2 Rol. 362. So a *que estate* is traversable, where it is material, though both parties do not claim from the same person. Bro. Que Estate, 8, 11, 35, 36, 37. So the time laid is traversable, if material ; but otherwise not. [See the beginning of the next section.] So any fact, which appears to be material, is traversable, though it be only matter of suggestion : as in prohibition, a suggestion that the spiritual court refused a plea which ought to be allowed, in a suit there for the tithes or other matter within their cognizance, is traversable ; otherwise their jurisdiction might be taken away by such a suggestion ; R. 2 Co. 45 a. [See 2 Bulst. 20. Fortesc. 329 ;] but it is otherwise where the matter of the suggestion is not the cause of the prohibition. R. Moor, 425. So any surmise which takes away the jurisdiction of a court, is traversable. Cro. El. 511. Com. Dig. Pleader, G. 11.

The rule above laid down, namely, that a traverse must be of the most material fact, must, however, be understood as meaning merely, that the fact traversed should be so material and essential a part of the cause of action or defence, that denying it with success will have the effect of destroying the cause of action or defence altogether ; see 11 Co. 10. Yelv. 200. Plowd. 230 b. 231 a. Doug. 154 ; for if the cause of action &c. consist of two or more such facts, the opposite party may traverse which of them he pleases. 6 Co. 24 b. 1 Wils. 338. Thus, if the plaintiff allege that A. being seised enfeoffed B., who died seised, and the land descended to his heir who demised to him ; and that afterwards A. ousted him, and disseised his lessor, and conveyed to the defendant : the defendant may traverse either the feoffment, descent or disseisin, as he pleases. Dy. 366 a. [See also Style, 344.] So in trespass, if the defendant plead that before the trespass A. was seised and leased to him, the plaintiff may traverse the seisin or the

lease; for both are material to the defendant's title. 6 Co. ^{24 a}. R. Hardr. 317. So, if he plead that A. being seised, enfeoffed B., who enfeoffed C., under whom he claims, the plaintiff may traverse the seisin or any mesne feoffment, if the defendant do not claim by any mesne conveyance from the plaintiff himself. 6 Co. 24 b. [10 H. 7, 8. 15 H. 7. 3. Doct. Pl. 364, 365.] So, if he plead that A. being seised in fee, conveyed to B. in tail, under whom the defendant claims; the plaintiff may say that D. being seised, granted to A. in tail, &c., and may traverse that A. was seised in fee, or the conveyance in tail. R. 2 Cro. 681. 2 Rol. 362. So, if the defendant say that A. being seised, leased to him, and *afterwards disseised him and leased to the plaintiff; the plaintiff may traverse the demise to the defendant or the disseisin. R. Cro. El. 798. So in trespass, if the defendant say that A. was seised in fee, and being outlawed and found by inquisition, &c., the defendant entered upon a Levary; and the plaintiff reply that B. being seised, demised to him: he may traverse the seisin of A., or that the land was not found by inquisition. R. Hardr. 316. In an information for an intrusion, if the defendant say that the king by patent granted to A., who being thereupon seised in fee, enfeoffed the defendant; the attorney-general may traverse the grant or feoffment, but not that A. was seised in fee, which was merely the consequence of the grant. Sav. 58. [So, where any party takes upon himself to state in any pleading a substantive averment, or allege a precise estate, which he is not bound to do; if it be material and bear on the question, he gives the other side an advantage of traversing it. 2 Saund. 207 a. and see Id. 206. (n. 21, 22. 24.) Yelv. 195.] As in replevin, if the defendant avow damage feasant in Blackacre; and the plaintiff in bar says he was seised in fee of a close, of which the defendant ought to repair the fences, and for default, &c.: the defendant may traverse his seisin in fee; Per 3 J. Wind, Dub. Dy. 365; [although the plaintiff need not have said more than that he was "seised" or "possessed," generally, or that it was his freehold or the like, without saying what precise estate he had in the premises; for if he had any estate, even an estate at will, or even mere licence from the owner to put his cattle into the close, it would be sufficient.] So, if the defendant plead that B. enfeoffed A., and the estate descended to his heir, who demised to him, and then B. disseised, &c.; the plaintiff may traverse the feoffment to A., or the descent, though neither need have been alleged. Dy. 366 a. [See 2 Str. 818. So, where the plaintiff declared that the defendant had bargained to sell him certain land, and that afterwards the defendant had conveyed it to another by feoffment; it was holden that the defendant might traverse the feoffment, although it need not have been

alleged. 2 H. 7, 12.] So, if a party do not rely on the most material matter, but goes to another point, he thereby gives his adversary the advantage of traversing it: as in an action for disturbance of common if the defendant plead that he is lord of the soil and put rabbits there, and prescribes for a warren; though he might justify as lord, putting beasts of warren on the common, yet when he goes on and prescribes for a warren (which was unnecessary,) the plaintiff may traverse the prescription. R. Lutw. 108. Com. Dig. Pleader, G. 10.

But the traverse of a thing which is immaterial, and was not necessary to be alleged, is bad: as in a *scire facias* for restitution of money recovered by a judgment which was afterwards reversed, if the defendant plead payment, *absque hoc* that he is *adhuc possessionatus de denar' prædict'*, the traverse is bad; for it was not necessary to be alleged in the declaration that the defendant *fuit adhuc possessionat' inde*, and was altogether immaterial. R. Cro. Car. 328. So in an action for an escape, if the declaration allege that the defendant voluntarily permitted A. to escape, and the defendant plead *fresh pursuit, he should not traverse that the escape was voluntary, for that was not necessary to be alleged. R. 1 Vent. 211. 217. Agr. Lutw. 382. So in trover for a horse sold, and the money converted to the defendant's own use, the defendant should not traverse the conversion of the money. R. Cro. El. 555. In an action on a charter-party, where the agreement was to sail with the first fair wind, the defendant should not traverse that he did not sail with the first fair wind, for it is not material; if he performed the voyage it was sufficient. Hardr. 69. So in trespass for taking five cart loads of hay, if the defendant justify for tithes, and traverse that there were five cart loads of hay, it is bad, for the quantity is not material. R. 3 Lev. 228. Lutw. 1315. So a traverse of a thing alleged after a *videlicet* or *scilicet*, is bad: D. 1 Lev. 245: [as if, in an action on a bond, the defendant plead that part of the sum, *scil.* 1500*l.* was won by gaming, and the plaintiff traverses the 1500*l.*, it is bad. 1 Str. 493. So a traverse cannot be taken of any thing in an *alias dictus*; 32 H. 6. 28; nor after *nuper*, unless the party be charged by reason of his office. 38 H. 6, 18. Doct. Pl. 356, 357.] So in trespass for chasing cattle *ita quod* one of them died, a traverse of what comes after the *ita quod* is bad. R. 1 Lev. 283. [1 Saund. 23. (n. 5.) 299. (n. 3.)] So if the defendant allege a discharge of tithes by unity of possession at the time of the dissolution, a traverse of the discharge is bad; it should be of the unity, *ratione cujus fuit* discharged: for a traverse of the discharge is a traverse of the conclusion only. R. Moor, 534. [See Sav. 58.] Com. Dig. Pleader, G. 12. So, in all cases where the words "*virtute*," "*prætextu*," "*per quod*," and the like,

introduce a consequence or inference from the preceding matter, they are not traversable, 11 Co. 10. 1 L. Raym. 408. 5 T. R. 66. 1 Saund. 23. (n. 5.) 299. (n. 3.) Per Treby, 1 L. Raym. 410, 412, but the preceding matter is alone traversable. So in replevin, if the defendant make conusance as bailiff, the plaintiff cannot traverse that he is hailiff; Bro. Bailiff, 1. 26 H. 8, 8 b. but see 1 Salk. 107. cont.; and the same in trespass, if the defendant justify as bailiff; 33 H. 6. 3. Per 3 J. 1 Rol. 46, but Rolle makes a *quære*; unless it appear to be material, in which case it is traversable: see 1 Salk. 107: as if it be pleaded that he did it by command of another; R. 1 Leon. 50; or without the privity of his master. R. 3 Lev. 20. So where in trespass the defendant said that the place where &c. is the freehold of A., and that he by his command &c.; it was holden that the command was not traversable, as the plaintiff did not claim under A. 6 Co. 24 a. But where the plaintiff claimed under the person by whose command &c., the court held that he might traverse the command. 37 H. 6, 7. see Cro. El. 463. So a mere intention is not traversable, because it cannot be tried: as in waste, if the defendant plead an assignment, and the plaintiff reply that the assignment was contrary to st. 11 H. 6. c. 5, to the intent that the plaintiff should not know against whom to bring his action, and that the defendant continued the possession; a traverse that the assignment was made to the intent &c., was holden bad, for he should have traversed the purnancy of the profits. R. 5 Co. 77 b. So a traverse that he used *a garden *secundum veram intentionem indenturæ*, is bad; for the intent is not traversable. R. 3 Lev. 167. So in an action *quare retinuit canem sciens ad mordendum oves consuet'*, the *sciens* is not traversable, but must be given in evidence. R. 1 Rol. 4 l. 45. Com. Dig. Pleader, G. 7. So in case against the sheriff for taking insufficient bail, to the intent to deceive him of his debt, the intention to deceive is not traversable. 1 Sid 96. and see Style, 383. 1 Leon. 50. 3 Bulst. 284. But where the declaration charges a man with any duty &c. *ratione tenuræ*, the *ratione tenuræ* is traversable. 2 Saund. 160. And even an intention, it seems, is traversable, if it be material: as if the defendant plead a payment to A. to the intent that he should pay rent in arrear to B., that the money was paid to A. with such intent may be traversed. R. 1 Salk. 196. So, that a man did an act voluntarily, is traversable, where it appears to be material: as, in debt for a fee upon a voluntary acceptance of knighthood, if the defendant plead that he accepted it by the command of the king, he must traverse that he accepted it voluntarily; for this is the essence of the action. Semb. Lutw. 381.

Also, if a man allege a matter of record, there should not be a form-

al traverse of it, for it cannot be tried by the country : as in debt upon a recovery in an inferior court of record, if the defendant traverse the recovery, it is bad. R. per 3 J. 1 Lev. 199. So, in *scire facias* against bail in error, who plead *quod judicium pendet indeterminatum*, if the plaintiff traverse it, it is bad ; for it must be determined by the record. R. 2 Salk. 521. Com. Dig. Pleader, G. 6. So the probate of a will is not traversable ; nor can it be alleged that the will was forged, or the testator *non compos*, or any other matter which would render it invalid. 1 Rol. Rep. 226. 2 Ro. Abr. 299. Hardr. 131. T. Raym. 406. Bac. Abr. Pleas, H. 2. So a sheriff's return cannot be traversed. Dy. 212. Cro. El. 790. 2 Mod. 10. Hardr. 112. So, a certificate granted by a person in his judicial character, such as certificate of bastardy by the ordinary. 1 Ro. Abr. 362. And see 7 Co. 41 b. is not traversable ; but when granted by him as a ministerial officer, it is. Cro. El. 80. 1 Leon. 269. Bac. Abr. Pleas, H. 2. In debt on bail bond, the court held that the arrest could not be traversed. 1 Str. 444. 643. So there can be no special traverse of matter of law ; for the court alone must judge of that. Plowd. 231 a. 2 H. Bl. 182. Yelv. 200. 2 Str. 841. But it is said that matter of law connected with fact, or rather matter of right resulting from facts, is traversable. 2 W. Bl. 776. 3 Wils. 234. 1 Saund. 23. (n. 5.) Yelv. 140. So, general customs are not traversable. See L. 5. E. 4, 31 a.

So, a traverse of a thing which is but supposal, is bad : as if tenant in *mort d'ancestor* pleaded joint-tenancy with the father of the demandant, he need not traverse that he was sole tenant ; for this was only supposed by the writ. 5 H. 7, 13 a. So, if a defendant plead *ancient demesne*, he need not traverse that it is frank free ; for this is only the supposal of the writ. 5 H. 7, 13 b. So, in *assumpsit* against an executor, who pleads that his testator was alive at the time of the writ purchased, he need not traverse his *death, for it is only supposed by the writ and count. Lutw. 14. [See 19 H. 6, 4 b.] But matter necessarily included, may be traversed : as if he plead that A. was seised, the plaintiff may allege seisin in B., *absque hoc* that A was sole seised. R. Mod. Ca. 158. Com. Dig. Pleader, G. 13. So, a traverse of inducement, is bad : as, in debt against an executor, if the defendant plead a judgment, and the plaintiff reply that it is satisfied, but is continued by fraud ; the defendant cannot traverse its being satisfied. R. Latch. 111. Hardr. 69. So, in *scire facias* against an executor on a *devastavit* returned, if the defendant plead "nothing in his hands," and traverse the *devastavit*, it is bad, for it was inducement only. R. Hardr. 70. So in covenant, if the plaintiff assign a breach that the house was burnt and

not repaired, and the defendant traverse that the house was burnt; it is bad, for it was only inducement. Hardr. 70. In avowry for rent, if the defendant allege seisin *in dominio suo ut de feodo talliato*, and the plaintiff in bar to the avowry say that he was seised for life, he need not traverse the seisin in tail, for it was matter of inducement only. R. T. Jon. 110. 1 Vent. 340. So in assumpsit, the consideration, though material, is not traversable, D. Cro. El. 201, [unless it be executory; see ante, p. 187;] nor in trover, the conversion. D. Cro. El. 201. R. cont. Cro. El. 97, for it is the gist of the action. [And see ante, p. 187.] But if the inducement be what entitles the plaintiff to his action, it may be traversed in cases where the defendant cannot wage his law. Cro. El. 169. Com. Dig. Pleader, G. 14. Dy. 121 b. 1 Leon. 252. As in an action for words, if the plaintiff allege that he took an oath before the mayor of London, and that the defendant said "you are forsworn;" that he took an oath before the mayor, is traversable. R. Cro. El. 169. D. 1 Rol. 43. So, in assumpsit upon an account stated, the defendant traversed his having accounted, and the court held the traverse good, the account stated being the foundation of the assumpsit. Cro. Jac. 234. Yelv. 171. 1 Bulst. 16.

So a matter not expressly alleged, need not be traversed: as if the defendant plead a grant used to be made of an office to such person or persons as B. pleased, and the plaintiff reply that it used to be granted to one person only, he need not traverse to several, for it is not expressly alleged. R. 10 Co. 59 a. If the plaintiff allege that the dean, archdeacon and chapter of B. leased to him, and the defendant plead that the dean and chapter of B. leased to him, *absque hoc* that there is such a corporation as dean, archdeacon and chapter of B., it is not good. Semb. Lane, 18. So if a man traverse a matter not alleged, it is bad: [22 H. 6, 35;] as if it be assigned as a breach of covenant, that he did not pay the salary of an office, and the defendant traverse that he did not receive the profits of the office, it is bad. R. 2 Vent. 79. So if the defendant justify by process out of an inferior court, the plaintiff cannot traverse that the matter arose within the jurisdiction, for it was not alleged in the plea. R. Lutw. 1560. So in trespass for cutting down trees, if the defendant say that the bailiff directed the taking of trees for repairs, for which purpose he took these trees; and the plaintiff traverse that the bailiff directed those trees to be taken: *the traverse is bad, for the matter traversed was not alleged. R. Lutw. 1480. Com. dig. Pleader, G. 8. The rule here laid down, however, is perhaps too narrow. The true rule appears to be, that nothing shall be traversed but what either has been before alleged, or is necessarily implied; see 1 Saund. 312 d. (n. 4.); for I take it to be a general rule in pleading,

that whatever is necessarily understood, intended and implied, is traversable, as much as if it were expressly alleged. 2 Saund. 10. (n. 14.) 2 Salk. 629. 6 Mod. 158.

Thirdly, as to the form of the traverse: Where the denial is by a special traverse, the plea consists of two parts, namely, the inducement or title, and the traverse. The inducement (although not in general traversable) is in this case an essential part of the plea; Semb. Cro. El. 671. 2 Cro. 86; for if it be omitted, the issue will be a negative pregnant. Semb. Hob. 321. [It must consist of matter, which is not only traversable, 2 Leon. 32. per Manwood, but such also as, if true, would be sufficient to defeat the title of the other party. Park. 131. per Parker.] It must be sufficient in substance: and therefore in prohibition upon a suggestion of a discharge of tithes, if the defendant plead an agreement between the master of the hospital of B. and the abbot, that the lands shall be discharged only in the hands of the abbot, and traverse the discharge, the inducement is bad; for it shews no title in the master of the hospital to the tithes, or how he could make such agreement. R. Cro. Car. 206. So if the defendant, in his inducement to the traverse, shew a defective title, the inducement is bad. R. Cro. Car. 336. As if, in bar to an avowry for rent to the assignee of a reversion, the plaintiff pleads that the land was devised to be sold, if the goods should not be sufficient for the payment of debts, and states a sale to him before the assignment, and traverses the descent to the assignor: this is bad; for the plaintiff should also have stated what debts and what goods there were, in order that the court might judge that the goods were not sufficient to pay the debts. R. W. Jon. 328. So a man cannot make a part of his plea an inducement to a traverse of the residue of the declaration; as in an action on the case for stopping three lights, if the defendant justify for two, *absque hoc* that he stopped three, the traverse is bad, for the inducement goes only to part of the declaration. R. Yelv. 225. So in an action for a recompence for his services, if the defendant plead that he served to such a day, and then departed, *absque hoc* that he served to the time stated in the declaration, it is bad; for he makes one part of the service inducement to the traverse of the other. R. 1 Saund. 268. So, in a *scire facias* against bail in error, who plead a judgment depending and not determined, the plaintiff cannot reply that the judgment is affirmed, *absque hoc quod pendet indeterminat*; for this makes a material part of the plea inducement to the traverse. R. 2 Salk. 520. But inducement to a traverse does not require so much certainty as a plea; because in general it is not traversable; R. Cro. Car. 442; and therefore if the party make title as

cousin and heir, and traverse the devise, it is sufficient, although he do not say how he is cousin. R. 2 Cro. 86. Com. Dig. Pleader, G. 20.

*This inducement is not in general traversable, but the opposite party is bound to the traverse. Hob. 104. 1 Saund. 20. 318. 1 L. Raym. 125. Vaugh. 62. and see Com. Dig. Pleader, G. 17, and can merely join issue upon it, by adding the similiter. There are two exceptions however to this; namely, 1st, that when the traverse is immaterial, and not to the substance and point of the action, the other party may pass it by, and traverse the inducement, Hob. 104. Moor, 870. 1 Saund. 20. 4 T. R. 440. per Buller. 6 Co. 24 b. 2 Lil. P. R. 588. and see Com. Dig. Pleader, G. 19, or he may demur specially for this cause; Cro. Jac. 221. Yelv. 151; 2dly, where the traverse is of the time or place stated in the declaration, the plaintiff may either traverse the inducement, or join in the defendant's traverse, at his election. Cro. Car. 105. Co. Lit. 282 b. Hob. 104. Moor, 428. 350. 1 L. Raym. 121. and see Com. Dig. Pleader, G. 18.

The form of the plea is thus: "*The said J. S. by A. B. his attorney says that*" [here state the matter of inducement, and then commence the special traverse thus:] "*Without this that*" [&c., stating the fact intended to be traversed, in words, or at least in substance, as it is stated in the declaration. The proper words of a traverse are "*Without this, that*" &c. ("*Sans ceo que,*" "*Absque hoc, quod.*") 1 Saund. 22; but words equivalent are sufficient; and therefore a traverse by the words "*Et non,*" is sufficient: as, where the defendant pleaded that A. was taken by a warrant returnable *die S. post Oct. Pur*, et non *virtute warranti retorn' die Ven'*, this was holden to be a good traverse of a warrant returnable *die Ven'*. 1 Saund. 22. 1 Lev. 192.

One quality of the traverse is, that it should be consistent with the inducement, see 30 H. 6, 5. Doct. Pl. 359, and the matter of it such as, if found against the plaintiff, is destructive of his title altogether. Vaugh. 3, 8. 1 Saund. 21. Show. P. C. 220, 221.

Also the traverse must not be multifarious or double, but must be of a single point. 30 H. 6, 5. Doct. Pl. 359. 3 Lev. 40, 41.

The traverse also should not be too large, so as to oblige the plaintiff to prove more than by law he would be obliged to do, in order to support his declaration. Thus a traverse of the surrender of a copyhold to such a steward on such a day, is bad; for the day and the steward ought not to be a part of the issue, but the traverse ought to be of the surrender *modo et forma*. R. Yelv. 122. 2 Cro. 202. So a traverse of a request at the day or place alleged, 3 Lev. 41, or of the assignment of a lease at such a day or place, Latch. 92, is bad, for the addition of the day and place makes it too large. See also 1 Leon.

39 [So where in debt on bond conditioned to serve the obligee for half a year, the defendant pleaded that he served the plaintiff for half a year at D. in the county of K., and the plaintiff replied that he did not serve him at D. in the county of K.; the replication was holden bad, for the place was unnecessarily made a part of the issue. 10 H. 6. 14. So where in trespass upon lands in A. the defendant pleaded not guilty in A., the plea was holden bad for the same reason. 8 H. 6, 34.] So in an action on the case for stopping three lights, a traverse that he stopped the said *three* lights, is bad; for if he stopped any of them, the action lies. Yelv. 225. *So in an action for wages *ab ultimo Dec' usque 1 Nov'*, it is bad to traverse the service *ab ultimo Dec' ad 1 Nov'*; for if he served any part of the time he ought to have his wages for such time as he served. R. 1 Saund. 269. So, on an indictment for using a trade for three months, a traverse that he did not use it for three months, is bad; for if he used it for one month only, he should be convicted. Per Saunders, 1 Saund. 312. [See also 2 Mod. 145. 2 L. Raym. 902. 1 Str. 493. 8 Mod. 58. 2 Str. 818. 3 Lev. 218. 2 Lutw. 1313.

Carter, 221. Peak, 313: But where it is not necessary to prove the issue in the precise terms of the traverse, it is otherwise: as wherein covenant for quiet enjoyment, the breach was that the lessor entered and ousted the lessee of the premises; plea, that the defendant entered to distrain, *absque hoc* that he ousted him of the premises, (without saying, "or any part thereof"): the traverse was holden good upon demurrer; for if issue were joined on the traverse, and the ouster of any part proved, the plaintiff must have had a verdict. 2 Salk. 629. 6 Mod. 150. 1 Saund. 312 d. (n. 5.) and see Cro. El. 84. Dy. 115 b.] So in an action on a policy of insurance, if the defendant traverse that *navis et munimenta* &c. were lost, it is bad; for it should be in the disjunctive; the plaintiff being entitled to recover for any part lost. R. 2 Saund. 206. [and see Id 207 a. (n. 21.)] So in trespass, if the defendant justify by *molliter manus* to prevent a rescous of an execution, in aid and by the command of a bailiff; a traverse that it was to prevent a rescous in aid and by command of the bailiff, is bad, for the command is not material. R. 3 Lev. 113. So in trover, if the plaintiff allege conversion by the sale of the goods, a traverse of the conversion by sale is too large. R. 2 Lev. 13. So a traverse that by indenture A. bargained and sold, is bad; for it makes the indenture part of the issue. Semb. Carth. 218. Com. Dig. Pleader, G. 15. and see 40 E. 3, 10 b.

Nor should a traverse be too narrow: thus, in an action for words, if the defendant justify as counsel at Westminster, and traverse the speaking at S. where it was alleged, at any time before or since, the traverse is too narrow and therefore bad; for it does not include the day on

which the speaking was alleged. R. 4 Co. 14 b. So in trespass, if the defendant plead that 27 Eliz. it was the freehold of A., and traverse the time before, but not the time after, it is bad; for the time after should also be traversed. R. Cro. El. 87. So if the defendant justify by process to the sheriff in another county, *absque hoc* that it was in the place alleged, it is bad; for he ought to traverse all places except the county into which the process went. R. Cro. El. 860. So, if the defendant justify under a lease to him for one year, and that he demised to the plaintiff for a quarter of a year, and after the end of the quarter took the goods damage feasant, and traverse the taking during the quarter of a year, it is bad; for he should also have traversed all times before and after his lease for a year. R. 2 Saund. 295. 1 Lev. 307. So in an action for a recompence for service, if the defendant plead that the plaintiff received 8*l.* *per ann.* for such a time, and traverse the service *ab inde*, it is bad; for by such a traverse the service for that time is excluded, and the plaintiff deprived of an answer to it, perhaps the 8*l.* *per ann.* was too small a recompence. R. 1 Saund. 268. So in **quare impedit*, where the plaintiff counts that A, being seised in fee granted to him &c., if the defendant plead that A. was seised for the life only of B. who died before avoidance &c., and the plaintiff maintain his count, and traverse that A. was seised for the life of B., it is bad; he should have traversed that A. was seised *modo et forma*; for if he was seised for the life of another only, be it for the life of B. or of any other, the plaintiff's title is thereby avoided. Sembl. Hob. 105. But if a traverse be narrower than it ought, yet if it tend to the disadvantage of him alone who took it, it is sufficient: as, in trespass, if the defendant justify by a precept out of an inferior court, and traverse all times before the delivery and after the return of the precept it is sufficient, though he might have traversed before the *teste*, for this is to the defendant's disadvantage. R. 2 Lev. 81. Com. Dig. Pleader, G. 16,

If a traverse be omitted, where it is essential in order to make a good issue, the omission may be taken advantage of by general demurrer; Hob. 233. R. 2 Mod. 60; but default of a traverse, when the party has not fully confessed and avoided, is only form, and aided upon a general demurrer; Per. And. 1 Lev. 44. R. cont. per 3 J. Rodes acc. 1 Leon. 80, 81. R. acc. Cro. Car. 324. Dub. 3 Mod. 319; and in either case it is aided by pleading over to the other matter. R. T. Jon. 111. 1 Sid. 301. On the other hand, if a traverse be taken, where it should not, it is only matter of form, and advantage can be had of it by special demurrer only. 6 Co. 24 b. Cro. Jac. 221. Yelv.

151. Cro. El. 161. 2 Lutw. 1457. 1558. 1560. Carth. 166. Cro. Car. 61. 2 Vent. 213.

So, a traverse of matter not traversable; Cro. El. 456. 161. 1 Saund. 268. 312 d. (n. 4.) 1 L. Raym. 238. 2 Lutw. 1560; or an immaterial traverse; 4 & 5 Ann. c. 16. 1 Saund. 14, (n. 2.) 21, (n. 1.); or want of inducement, Hob. 316, 321, or a defective or irregular inducement; or where the traverse is inconsistent with the inducement; or where the traverse is double, Fortesc. 379, or too large, cont. per 3 J. 2 acc. Yelv. 122, or too narrow: 2 Saund. 5. Carth. 165, 166: in all these cases advantage must be taken by special demurrer; if the adversary demur generally or plead over, the defect is cured.

Title and Colour.] We shall now treat of the implied denial of the cause of action, (to which we alluded shortly in a former page,) namely, where the defendant pleads a title, and gives colour to the plaintiff. This happens in actions for real or chattel property, where the plaintiff is not obliged to set out his title in the declaration. The defendant in such a case may plead his title to the property in dispute; which will have the effect of forcing the plaintiff to come to an issue upon some single point of it, either by traversing it directly, or by pleading his own title, and concluding with a special traverse of some part of that of the defendant. If the defendant however were to plead his title alone, his plea would be objectionable as amounting merely to the general issue. See ante, p. 177. Therefore to obviate this objection, he gives in his plea a colourable title to the plaintiff, bad in point of law, and which being merely matter of supposal is not traversable; see ante, p. 190; but *which has the effect of freeing the plea of the objection arising from the rule now alluded to. The title set up by the defendant must of course be inconsistent with that which is necessary to support the plaintiff's action, and such as, if true, destroys his cause of action altogether.

This species of plea occurs usually in trespass; it was formerly used also in assise, in the writ of entry *sur disseisin*, writ of entry in nature of an assise, 21 H. 6, 12. 10 Co. 90 a. b., and sometimes (though very rarely) in trover. But where the defendant entitles himself by act of parliament, Doct. Pl. 77, or other matter of record, 21 E. 4, 65 a., or pleads a release, 32 H. 6, 1, a warranty, estoppel, or fine with proclamations, 10 Co. 90. Doct. pl. 77. see 22 H. 6, 42. 22 E. 4, 4 b., or pleads a title which is binding on the plaintiff and his blood for ever, Id., or entitles himself through the plaintiff, 6 H. 7. 14. 10 Co. 91 a., or pleads *liberum tenementum* generally, Doct. Pl. 78. 22 H. 6. 50 a., or *liberum tenementum* of A., by whose command &c., Id. ibid, he need not give colour. So when a man pleads to the writ, or to the action of

the writ, no colour is given. 22 H. 6, 50. So, if a man justify for tithes, wreck of the sea, waifs, or estrays, he need not give colour. 21 E. 4, 65 a. 12 E. 4, 5 b. 10 Co. 90 a. b. see 9 E. 4, 22. Ras. 684. 684, 635. 12 E. 4, 12. 2 E. 4, 18. 39 H. 6. 1. Where in assise the defendant justified under a lease for years, it was holden that he need not give colour, as he did not plead in bar of the assise, or take the freehold on himself. Dy. 246 b. But where a defendant pleads a dying seised and a descent to himself, he must give colour. 22 H. 6, 18, 19. So where in trespass for entering the plaintiff's house and taking his goods, the defendant pleaded that one A. was possessed of the said goods, which goods, being in the plaintiff's house, A. sold to the defendant, and that he entered the plaintiff's house with his wife's licence, and carried away the goods; the plea was holden bad for want of colour. 3 Leon. 266. If in trespass or trover for goods, the defendant plead that he purchased them of such a person or of a stranger in market overt, he need not give colour; for he does not deny the plaintiff's title, but merely shews a right in himself to retain the possession. 10 Co. 90 b. Rast. Ent. 675, 676. But if the defendant were to say that A. was possessed of these goods *ut de bonis suis propriis*, and sold them to him in market overt, he must give colour. Id. ibid. So if the defendant say that he bought the goods of a stranger in market overt, that the plaintiff took them, and that he retok them from the plaintiff, colour is not necessary. 32 H. 6, 1, and see 34 H. 6, 11. So in trespass, if the defendant justify the taking of cattle damago feasant, he need not give any other colour; for by this justification he acknowledges the property in the cattle to be in the plaintiff. 12 E. 4, 12 b. Co. Ent. 652, 653.

Colour must have the following qualities: 1st, It must be a matter doubtful to the jury, and at the same time be no title in law; as where the defendant says that the plaintiff comes in by colour of a deed of feoffment whereby nothing passed; this is good colour, it being matter of doubt to *lay gents* whether the land passed by this feoffment without livery. 2dly. It ought to have continuance, though it want effect: as where colour is given by colour of a deed of demise to the plaintiff for the life of A., who was dead before the trespass, this is no colour, for it does not continue; but he should say that the plaintiff claims by colour of a deed of demise made to him for his life, whereby nothing passed. 3dly. The colour should be such as, if effectual, would maintain an action of that description; as in assise, he should give colour of a freehold, &c. 10 Co. 88, 91 b. Doct. Pl. 72. To say that the plaintiff claimed by a dying seised of his ancestor, whereas his ancestor did not die seised, is no colour; for that is not matter doubtful to

the *lay gents.* 33 H. 6, 53 b. 54. So, colour given by the release of one who was not seised, is bad, for the same reason. 38 H. 6, 5. and see 19 H. 6, 20. 20 H. 6, 39. So in trespass brought by a woman, the defendant said that her baron was seised, and enfeoffed him, and died, and that she, claiming the land as her dower, entered, and that he re-entered; this is no colour, for she could not enter for her dower. Per Fulthorp, 19 H. 6, 20; but Paston and Markham said that it had been adjudged otherwise. In trespass for the taking of emblements, it is no colour for the defendant to say that the place is his freehold, and that the plaintiff sowed it with his grain, and now wished to have the crop; for it gives the plaintiff no colour of title to it. But to say that the plaintiff disseised him, and sowed the land &c. is good colour. See 24 H. 6, 1. 37 H. 6, 7. In trespass, where the defendant says that A. was possessed of the goods *ut de bonis propriis*, and the plaintiff, claiming them by colour of a deed of gift afterwards made, took them, and that he retook them; this is no colour, for it in fact states a good title in the plaintiff. Cro. Jac. 122. see 28 H. 6, 4.

In trespass *quare clausum fregit*, the usual colour is by a deed of demise by the person through whom the defendant claims, to the plaintiff, for the plaintiff's life, whereby nothing passed. See the form, 9 Went. 108. 125. It must be a deed of demise for life, for it is by the omission of stating livery that it becomes colour; and consequently the statement of a deed of demise for years is no colour. 10 Co. 69. And much less is a lease for years colour in assise; for, besides the reason above mentioned, it is no colourable title with which to maintain an assise. Keilw. 103. In trespass also, to say that the defendant was seised, until disseised by the plaintiff, and that he afterwards entered and committed the trespass, is good colour; Per Newton, 21 H. 6, 36; and see 7 H. 6, 35; and the same in forcible entry. 21 H. 6, 39. Rast. Ent. 62, 59.

In trespass to goods, the usual colour is that the defendant bailed them to A., who delivered them to the plaintiff, and that the defendant took them from him. 10 Co. 90 b. But to say that they were the property of A., who bailed them to the defendant, and that the plaintiff took them from him, and he retook them from the plaintiff, is no colour. 21 H. 6, 36.

In assise, writ of entry &c., the usual colour was by charter of feoffment. If the defendant said that the plaintiff claimed *colore feoffamenti*, it was bad colour; it should be *colore chartæ feoffamenti*; 2 Rol. 140; because the word "feoffment" by itself is intended to include livery. 10 Co. 89.

In all these cases, where the defendant derives title by several *mesne.

conveyances, he must state the feoffment or demise in the colour to be from the person first named ; otherwise the colour will be bad. 2 Rol. 140. 22 E. 4, 25 a. 10 Co. 91 b. Co. Ent. 652, 660. Rast. Ent. 629, 641. See 21 H. 6, 32. 21 H. 6, 40. 32 H. 6, 6.

Where the defendant pleads letters patent, he should give colour by former letters patent in this form : *Colore quarundarum literarum patentium fact. prædict.* the plaintiff, &c. *ubi nil transivit* : and not that the plaintiff claims *colore concessionis sive dimissionis*, &c. ; 10 Co. 90.

What we have now considered is express colour, but colour is sometimes implied in the matter of the defendant's plea ; and in that case express colour is unnecessary : as, where the defendant pleads that he took the cattle damage feasant, he need not give colour, for the plea implies that the plaintiff has title to the cattle, at the same time that it asserts the right of the defendant to detain them. 12 E. 4, 12 b.

Want of colour is aided after verdict, by stat, 32 H. 8. c. 30 ; and after judgment by default, &c., by 4 Ann. c. 16. §. 2. Giving colour where it is not requisite, however, cannot be objected to.

Negative Pregnant.] Before we close this part of our subject, it may be necessary to make a few observations on what is technically termed a Negative Pregnant. When a negative supposes or implies an affirmative, it is termed a negative pregnant : as *ne dona pas per le fait*, which implies a gift by parol ; and therefore the plea should be *ne donna pas modo et forma*. Co. Lit. 126 a. 303 a. Bac. Abr. Pleas, I. 6. In trespass for cutting his trees, the defendant pleads that it was by the plaintiff's command, and the plaintiff replies that he did not cut the trees by his command : this is a negative pregnant ; he should have pleaded *ne commanda pas*. 21 H. 6, 46, 47. After issue joined, the defendant pleaded a release of the plaintiff *puis darrein continuance*, and the plaintiff replied that it was not his deed *puis darrein continuance* ; this was a negative pregnant. 21 H. 6, 9. In case against an innkeeper, for that the plaintiff's goods were embezzled by his default, he pleaded that they were not lost by his default ; this is a negative pregnant. 22 H. 6, 38, 39. In case for burning the plaintiff's house by the negligent keeping of the defendant's fire, the defendant pleaded that the house was not burnt by the negligent keeping of his fire, and it was holden to be a negative pregnant. Per Moyale, 28 H. 6, 7. So, if the defendant plead that the cattle died in a pound overt by the default of the plaintiff, and the plaintiff reply that they did not die by his default in a pound overt, it is a negative pregnant. 5 H. 7, 9. So, in trespass, the issue joined was that the defendant did not disseise the plaintiff to the use of W. P., and holden to be a negative pregnant ; but had he pleaded *non disseisivit modo et forma*, it had been good. 33 H. 6, 37, 38. So, in trespass,

where the defendant justified by reason that the particular tenant aliened the reversion in fee, and the plaintiff replied that he did not alien in fee; this is a negative pregnant; for if he aliened *pur auter vie* only, the defendant's entry was congeable. 40 E. 3, 5 a. Doct. Pl. 256, 257. So, in a writ of entry in *consimili casu*, if a man counted of an alienation in fee, and *the defendant pleaded that he did not alien in fee, it is bad; for it implies that he did alien, though not in fee. Dy. 17 a. In waste against a lessee for years, if the defendant plead that he did not lease for years, it is a negative pregnant. Kit. 232 b. So, if the day or place be made parcel of the issue, it is a negative pregnant. R. 2 Lev. 11. So in debt on bond conditioned for the performance of a covenant, which was, that he would not grant without the plaintiff's consent, if the defendant plead that he did not grant without the plaintiff's consent, it is bad. R. 2 Cro. 560. [See 1. Lev. 83. and *infra*.] So in trespass, where the defendant justified his entry by the plaintiff's licence, a traverse *quod non intravit per licentiam suam* was holden to be a negative pregnant. R. 2 Cro. 87. Com. Dig. Pleader, R. 5.

The only way of objecting to a negative pregnant, is by special demurrer; Lil. Reg. 437; it is aided by a general demurrer, or by pleading over, &c. And where the affirmative implied in the negative is not sufficient to maintain the adversary's pleading, a negative pregnant cannot be objected to even upon special demurrer: as in debt, upon a retainer in husbandry, if the defendant plead that he did not retain him in husbandry, it is good; for a retainer generally is not sufficient to maintain his count. Bro. Issue, 25. R. 38 H. 6, 22. So in an action on the stat. Ric. 2, if the defendant plead that he did not enter *contra formam statuti*, it is good, though a negative pregnant. Kit. 232 b. So, in an action upon any statute, if the defendant plead that he did not do so and so *contra formam statuti*, it is good. Kit. 233 a. [Qu. see ante, p. 167.] In debt on a bond conditioned to abide by an award, so that it be delivered to the parties, &c. a plea that no award was made and delivered to the parties, is good, though a negative pregnant; for it is pursuant to the condition, which is entire. Kit. 233 a. [And see 1 Lev. 83.] Com. Dig. Pleader, R. 6.

2. Confession and Avoidance.

In what Cases.] We have before mentioned, that the matter of a plea must be either a denial of the cause of action, or a confession and avoidance of it, or matter of estoppel. Therefore where you cannot deny the matter stated in the declaration, or plead matter of estoppel you must confess and avoid it, if the facts of the case will allow of your

doing so. As if the defendant have matter of justification or excuse, he should plead it thus specially, admitting the facts complained of in the declaration, and pleading his excuse or justification in avoidance of it. Co. Lit. 282 b. [As in an action for assault and battery, if the defendant committed them in his own defence, he should plead that matter specially. 1d. 2 Inst. 316. 22 H. 6, 33 a. So in detinue, if the goods were pledged with the defendant for a sum of money, which is not entirely repaid, that matter must be pleaded specially. 22 H. 6, 33 a. So, in all other cases, whatever makes the fact complained of lawful, is matter of justification, and may be pleaded specially; as, for instance, in an action of trespass, a licence must be pleaded specially. Hob. 174. 2 Salk. 580. 5 Mod. 252. So in trespass for taking goods, if he *took them as a deodand, he must plead that specially. 1 Str. 61. So in trespass *quare clausum fregit*, that the *locus in quo* is a high-way must be pleaded specially; Barnes, 448; and the same if the defendant claim an easement. 2 Wils. 173. So if his defence arise from matter of record, he must plead it specially. Co. Lit. 303 a. So matters of law, which go in discharge of the action, must be pleaded: such as the statute of limitations. Carth. 387. 1 Salk. 278. If a man execute a deed by duress, he must plead that matter, for he cannot give it in evidence under *non est factum*. 5 Co. 119. 2 Inst. 492. So if a bond be given for a gaming debt, that matter must be pleaded specially. 1 Str. 496, and see dy. 375 b. Cro. El. 915. Hob. 72. 166. So, if a feoffment be obtained by covin, the covin must be specially pleaded. Hob. 72. So, if waste be assigned in a house, the defendant, on *nul waste* pleaded, cannot give in evidence that the house was repaired before action brought; but that must be specially pleaded. Dy. 276 a.] And if the defendant justify by process out of an inferior court, he must shew in what action, &c., in order that it may appear that the inferior court had jurisdiction. Per 2 J. March, 118. So in debt upon a lease of a vicarage, if the defendant plead a sequestration, he should shew before whom, for what cause, and legal process. Hob. 296. Also, if the defendant plead a discharge, he must shew specially how he was discharged: as if he plead a discharge of tithes, which is a bar to a thing due of common right, he should shew how. Hob. 296. Com. Dig. Pleader, E. 15. So if the defendant were authorized by a warrant or other authority to do what he is charged with in the declaration, he should regularly shew the warrant, &c. specially. Co. Lit. 283 a. As in trespass, if the defendant justify as bailiff to the sheriff, it is not sufficient to say that he acted by virtue of a certain warrant directed to him; but he must set it forth specially: R. 3 Mod. 139. 1 Salk. 107, 108; 4 Mod. 378. [1 Saund. 298. (n. 1); and he should shew the substance.

and effect of his authority to have been specially pursued. Co. Lit. 303 b. Com. Dig. Pleader, E. 17. These few general observations will suffice upon the subject, in this place; but the Reader will find it treated of at a considerable length in other parts of the Work, where the pleadings and evidence in the several actions respectively are noticed. And see ante. p. 73, *et seq.*

Title when stated.] In a former part of this work (see ante, p. 92, 93,) it was remarked, that in personal actions for injuries to the plaintiff's land, or for infringements of rights arising from his possession, &c., as in trespass *quare clausum fregit*, case for nuisance, or for disturbance of common or right of way or franchise, or the like—it is not necessary to set forth his title, but he may declare generally on his possession, &c. But in pleas, the rule is otherwise; for if the matter of defence arise from title in the defendant, whether it be title by descent, by prescription or custom, by alienation, by deed, or by matter of record, the title must be set forth fully in the plea. 4 T. R. 718. 2 Cro. 52. Yelv. 74. 1 Ro. Rep. 13. and see 37 H. 6, 38, per cur. As in trespass *quare clausum fregit*, where the defendant justifies the trespass, by reason of some title or easement which gives him a legal right to do the act, which is the subject *of the action, he must set forth his title, or right to enjoy the easement, specially, in order that the plaintiff may have an opportunity of traversing it. And the same rule prevails in replevin. 2 Saund. 402. (n. 1.) In a plea justifying under a right of common, the defendant must set out his title to the common specially; and formerly this was done by shewing a seisin in fee either in himself or some other under whom he derived title, and then prescribing in a *que estate* for the right of common. 4 T. R. 718, 719. Cro. Car. 549; but see 2 & 3 W. 4, c. 71, s. 5, *infra*. So, in case for not repairing a private road leading through the defendant's close, it is sufficient for the plaintiff to allege generally that the defendant, as occupier of the close, is bound to repair; but where a defendant prescribes for a right of way or other easement in right of his own estate, he must set forth specially the estate, in right of which he claims the privilege. 3 T. R. 776.

But where the defendant's title or right is matter of inducement or conveyance merely, it is sufficient for the defendant to allege that he was possessed &c., and state his title generally, as in a declaration: as where the justification is, an escape of cattle from a common to a close in which &c., through the defect of a fence which the plaintiff was bound to repair, or an escape from the defendant's own close: here the defendant's title being mere inducement to the matter of defence, may be stated generally as in a declaration. Yelv. 75. 1 Saund. 346. (n. 2.) So, in trespass for an assault, if the defendant say that he was

possessed of a house for years, and the plaintiff disturbed him, for which reason *molliter manus imposuit*, &c.; it is sufficient, without shewing by what title he was possessed. R. Cro. Car. 188. 4 Mod. 420. Though if the defendant in such a case will set forth his estate specially, he thereby gives the plaintiff an opportunity of traversing it. Dy. 365. F. N. B. 298. (n. 2.)

So, in trespass for taking cattle or goods, if the defendant justify damage feasant, he need not set forth his title specially; but it is sufficient for him to say that he was *possessed* of a close, and so justify. 2 Saund. 346 d. 2 Salk. 643. 3 Mod. 132. 2 Mod. 70. and see Com. Dig. Pleader, C. 41. In replevin, on the contrary, the defendant must in his avowry either allege the taking in his freehold, or, if he have only a particular estate for years, derive his title from the tenant in fee. 1 Saund. 346 e. (n. 2.)

In a plea under stat. 2 & 3 W. 4, c. 71, claiming a watercourse, it is sufficient to aver an user of the right for forty years next before the commencement of the suit, and it is not necessary to allege that it had existed for forty years before the act complained of in the declaration. And where a replication to such a plea set up a life estate, in order to bring the case within the 8th section of the Act, it was holden that it should show that the plaintiff was the person entitled to the reversion expectant upon such life estate. *Wright v. Williams*, 1 Tyr. & Gr. 375.

By stat. 2 & 3 W. 4, c. 71, s. 5, however, "in all actions on the case and other pleadings, wherein the party may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned (see ante, p. 25,) which shall be applicable to the case, shall be admissible in evidence, to sustain or rebut such allegation. And that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act, (see ante, p. 25,) as may be applicable to the case, and without claiming in the name or the right of the owner of the fee, as is now usually done. And if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, (see ante p. 24.) or on any cause of matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in

answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

The Plea must confess the cause of Action.] The plea consists of two parts, the confession, and the avoidance. As to the confession, it is a general rule in pleading, that the party justifying must shew and admit the fact. 1 Saund. 14. (n. 3.) 28. (n. 1.) 3 T. R. 298. 1 L. Raym. 38. 2 Salk. 637. 4 Mod. 404. 1 Salk. 394. Carth. 380. Therefore in trespass for an assault and battery, if the defendant as to the *vi et armis* plead not guilty, and *quoad residu' transgressionis* justify by the taking of the defendant's hat off in church, it is bad; for this is no battery. R. 2 Vent. 193. Semb. (*but cur cont.*) 1 Saund. 14. So, where the defendant pleaded that he was riding a horse on the highway, and the horse being frightened ran away with him, and ran upon the plaintiff's ground against the defendant's will; this was holden to be bad; because, by the defendant's own account, he was not guilty of a trespass, and should therefore have pleaded the general issue. 1 L. Raym. 38. 2 Salk. 637. 4 Mod. 404. So, in trespass for an assault and imprisonment, it is not sufficient to say in the plea that the defendant shewed the plaintiff to an officer who had process against him, and who thereupon arrested him, without saying that he requested the officer to arrest; for without such request it is no confession of an imprisonment. R. 4 E. 4, 36 a. And the confession must be co-extensive with the avoidance: that is, it must confess all that part of the cause of action, to which the plea, in its commencement, purports to be an answer.

A plea of confession and avoidance must confess the cause of action; and, therefore, in debt for goods, a plea that the defendant was discharged, by order of the Insolvent Debtor's Court, of and from the said several debts and causes of action "*if any*," was holden bad on special demurrer. *Gould v. Lasbury* 4 Tyr. 863.

If the plea do not confess the cause of action, the plaintiff may demur specially for that cause.

Quæ est eadem.] In trespass, the matter of the plea is concluded with a statement, that the trespass justified is the same as that complained of in the declaration, or (where the plea is only to part of the declaration) the same as the trespass or trespasses mentioned in the introductory part of the plea. See 9 H. 6, 30. Doct. Pl. 253. Skin. 604. 2 Saund. 5. (n. 3.) The form is thus: "Which are the same assaulting, beating and ill-treating the said J. N., in the said declaration mentioned, and whereof the said J. N. hath above thereof complained against him the said J. S." or "which are the same supposed trespasses in the introductory part of this plea mentioned, and where-

of the said J. N. hath above thereof complained against him the said J. S."

So in conspiracy, if the defendant justify, he should conclude that it is the same conspiracy. Kit. 237 b. So in *quare impedit* on an avoidance by deprivation, if the defendant plead a deprivation, *after which the church lapsed, &c., he should conclude "which is the same deprivation," &c. Dy. 293 a. But if the defendant do not justify, but merely excuse himself, he should not say *quæ est eadem*. So, in trespass for false imprisonment, if the defendant plead that he brought the plaintiff to S. with his consent, he cannot say "which is the same imprisonment; for it is no imprisonment if it were against his will. Kit. 237 a. Or if he plead that he advised A. (being in fear of his life from the plaintiff) to go to a justice of the peace for a warrant, and that by such warrant he was arrested, he cannot say "which is the same," &c.; for he was not imprisoned by the defendant, but by A. R. 12 H. 7, 14 b. So, if the defendant, in debt on bond, plead *per minas*, and the plaintiff reply that he the said "if the defendant would not give him a bond for the rent, he should sue him:" he should not conclude "which is the same menace," for it was no menace in the legal acceptation of the term, but lawful. Kit. 237 b. So in maintenance, if the defendant say that he feed counsel, he cannot say "which is the same," &c., for this is no maintenance. Ibid. So in trespass for an assault, battery and wounding, if the defendant justify by an arrest under a warrant, and add "which is the same assault, battery, and wounding," it is bad; for the justification does not extend to the wounding. 21 H. 7, 30. Com. Dig. Pleader, E. 31.

3. *Matter of Estoppel.*

In what Cases.] An estoppel is, when a man is precluded, by his own act or acceptance, from saying the truth. Co. Lit. 352 a. And it may be by matter of record, of writing, or in pais. Id. And first, by matter of record: as if the king by his letters patent grant lands to B., who claimed nothing in the freehold; B. cannot afterwards say against the king, that he was enfeoffed by A. 1 Rol. 864, l. 6. So, if a man levy a fine or suffer a recovery to A. of the land of B., in B.'s name; it shall be an estoppel to B., and he cannot avoid it without a writ of disceit; for he cannot aver against the record. 1 Rol. 863, l. 17, 20. 22. [Cro. El. 531. So, if A. be disseised, and during the disseisin a recovery is had against him as tenant, to the use of B.; though the recovery was void, for want of a good tenant to the *præcipe*, yet it shall be good by way of estoppel against A., his heirs and assigns. R.

1 Rol. 865, l. 15. Cro. Car. 389. 1 Rol. 868, l. 35.] If a man acknowledge a deed to be inrolled in court, and it be inrolled of record, he cannot afterwards say *non est factum*, R. 39 H. 6, 32 b. 1 Rol. 862, l. 12, though it was acknowledged by his attorney for him and not in person. R. 39 H. 6, 39 b, and although the attorney had no special authority to do it. Id. 1 Leon. 184. 3 Leon. 84. Comb. 248.] So, if A. levy a fine of the lands of another, he shall be estopped to say *partes finis nihil habuerunt*. W. Jon. 459. So, a man may be estopped by his pleading upon record: [see Dy. 138. 33 H. 6, 2:] as, if a *scire facias* be brought to revive a judgment of Trinity term, and *null tiel record* pleaded, and judgment thereupon; the defendant cannot afterwards say that the judgment was of *Michaelmas term. R. 1 Salk. 276. So, if A. by deed be bound not to sue B., and a breach be assigned that he sued an original, and at the return in bank *obtuli se versus B. in placito proed*; he cannot plead that he did not sue *modo et forma*, for he is estopped by the record. 1 Rol. 863, l. 30. In waste against a lessee on demise of the plaintiff, if the defendant abate the writ by plea that the demise was by the plaintiff and another; in another action by both, he shall be estopped to say that the lease was by one only. 1 Rol. 864, l. 10. So, if a man by plea confess a tenure *in capite*, and plead a licence for alienation, he cannot say upon another alienation that he does not hold *in capite*. 4 Inst. 111. So, if in a *nuper obiit* or *rationabili parte* by one parcener against another, the defendant disclaim in blood and claim by purchase, the plaintiff shall have a writ *de mort d'ancestor* for the whole. Co. Lit. 164 b. So a man may be estopped by an imparlance or continuance upon record: Co. Lit. 352 a.: [as formerly where the defendant pleaded in abatement after a general imparlance, or to the jurisdiction after a special or general imparlance, the plaintiff might allege the imparlance in his replication, by way of estoppel. Clift. 18 pl. 46. 19 pl. 50. 20 pl. 53, 54. 1 Lutw. 23. 2 Saund. 3. (n. 2.)] So a man may be estopped by any confession or admission upon record. Co. Lit. 352 a. [Thus, a defendant is estopped, by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer in abatement, though he himself be no party to the recognizance. 2 New Rep. 453. 1 B. & P. 645. 105. 2 Wils. 293. Willes, 462. 1 Salk. 8. 7 Mod. 38. 1 Salk. 3. But if a man came in gratis on the exigent, or appear gratis to a *capias*, he was not thereby estopped from pleading misnomer, &c. 19 H. 6, 43. Styl. 395. Yet where a man was outlawed by the name of J. S. de B., and sued out a *supersedeas* by the same name and addition, it was holden that he could not afterwards be received to say that there was no such vill as B. in the county. 19 H. 6, 44 a. Doct. Pl. 161.

In attaint against the tenant in assise and the jurors, the court held that the tenant was estopped from pleading outlawry of one of the plaintiffs⁵ because as he had before pleaded to the disscisin, he had thereby acknowledged that the plaintiff had a right to sue. 2 H. 7, 2. So, after pleading joint-tenancy, or waging his law of non-summons, a man shall not plead non tenure; because by the former pleas he acknowledged himself to be tenant. 33 H. 6, 2.] So, a man may be estopped, by not denying a matter alleged upon record: as if A. be seised in fee, and B. bring waste against him, supposing him in of his demise; though A. plead *nul' wast fait*, and it be found for him, he shall afterwards be estopped to say that he is not in of the demise of B. 1 Rol. 864. l. 15. If a prior pray in aid of his patron, and the plaintiff say that he has a convent and common seal; if he do not deny it, but demur, (whereby he is ousted of aid,) he cannot afterwards say that he has no convent or common seal, as he did not deny it before. 1 Rol. 864. l. 40. So, if the defendant pray in aid of the reversioner, and the plaintiff say that the defendant is seised in fee, which he does not deny, and he is thereby ousted of aid; he shall not afterwards be permitted *to say that he was tenant for life. 1 R. 864. l. 45. So, a man may be estopped by a verdict upon record: as in trespass, if the defendant prescribe for common, and the plaintiff traverse the prescription; the defendant may say that in a former action by the plaintiff against the defendant, the same prescription was found against the plaintiff. Semb. 1 Show. 28. [So in all cases, if a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. 3 East, 346. If a man bring an action as heir to A., the defendant may plead that in a former assise the plaintiff was found bastard. 3 H. 6, 15.] And matter of estoppel in a count (though it be but by way of supposal) after judgment, concludes the parties in another action. Co. Lit. 352 b. So a matter expressly alleged in a plea, replication or other pleading, will estop after nonsuit, as well as after judgment. Co. Lit. 352 b. 7 H. 6, 20. But after a nonsuit, a matter of supposal in the count will not have the effect of an estoppel. Co. Lit. 352 b. Com. Dig. Estoppel, A. 1.

Where by a deed between A. and B., reciting that A. had invented certain improvements in looms, for which he obtained a patent, A., for a certain consideration, granted the use of the invention and patent to B: in an action on the deed by A. against B. it was holden that B. was estopped by the deed from denying that A. had invented the improvements. *Bowman v. Taylor*, 2 Ad. & E. 276.

Where a party executed a bond, describing him as "Thomas Bonner of Callerton, in the county of Northumberland," it was holden that he was thereby estopped from denying this to be his name and addition. *Bonner v. Wilkinson, in error*, 5 B. & Ald. 682.

Secondly, A man may be estopped by matter of writing, which is not of record: as if the condition of a bond recite that there are divers suits in B. R. between the parties, the obligor is estopped to say that there are no such suits there. R. Cro. El. 756. If the condition be to perform covenants in an indenture, he shall be estopped to say that there is no such indenture. R. 1 Rol 408. 1 Rol. 872. l. 30. [2 B. & P. 299. Cro. El. 757. 1 Saund. 316. 1 Mod. 15. and see 1 Lev. 3. 45.] So in all cases where the condition of a bond has a reference to any particular thing, the obligor is estopped to say that there is no such thing: as if the condition be to pay all sums which T. is bound to pay to the children of B. according to the will of D., he shall be estopped to say that T. is not bound to pay, &c. 1 Rol. 872. l. 50. Dy. 196 a. [Dy. 3 Sav. 90.] So if the condition be, to release all the right which he has in B. for his life, he cannot say that he had no right in B. for life. Per Tanfd. 1 Rol. 873. l. 5. So if a condition be, to pay money for which he is bound in such a particular recognizance, he cannot say that there is no such recognizance, R. 1 Rol. 873. l. 10, or that he was bound in such a recognizance as appears not to be one. R. 1 Rol. 873. l. 15. So, if the condition be, to give part of the goods which A. devised to him, he cannot say that A. did not devise. R. 1 Rol. 873. l. 20. [Moor, 420.] So if a condition be that A. and his wife shall appear at B., he cannot say that A. has no wife. R. 1 Rol. 873. l. 25. Alleyn, 13. So, if the condition, reciting that A. carried 1200 billets to D., be, that he shall pay so much the hundred, he cannot say that A. did not carry 1200. R. Alleyn, 52. [So if the condition be to pay so much a week for the support of a bastard, according to the order of a justice of peace, he cannot say that there was no such order. Noy, 79. Latch. 125. So, if A. give a bond by the name of B., and he be sued upon it by the name of B., he is estopped from pleading the misnomer. 1 Salk. 7.] So, a man may be estopped by any indenture or deed-poll: Co. Lit. 352 a: [as if a seaman covenant to serve his *captain for three years, at certain stipulated wages, he is thereby estopped from suing for a higher rate of wages during the time agreed upon. 3 B. & P. 69. So, if A. lease by indenture to B. to commence after the expiration of a lease to D.; in covenant by B. against A., A. is estopped to say that there is no such person as D. 2 Leon. 11. and see 1 Vent. 84. Vaugh. 62. In account upon a receipt by indenture, the defendant is estopped from saying *ne unques son receiver pur account render*. Dy. 51. By

indenture, reciting that A. was seised in fee of certain lands, A. granted a rent out of them to B., and covenanted to pay it; in an action on this covenant, A. is estopped to say he had nothing in the lands, and that a stranger was seised thereof. *Alleyne*, 79. see 2 *Barn. & Ald.* 367. And indeed in general the grantor is estopped by his deed to say that he had no interest. 2 *T. R.* 171. and see 3 *T. R.* 439 441. Yet this principle has been holden not to apply, where the grantor is a trustee for the public; and still less where such trustee, deriving his authority under a public act of parliament, grants that which the act does not empower him to do. 2 *T. R.* 171. In debt on bond conditioned for payment of rent reserved on a demise, the defendant is estopped to say that the plaintiff had nothing in the lands demised. *Cro. El.* 262. *Poph.* 114. *Moor*, 405. *Owen*, 110. So, if a lease be executed by the lessee and lessor, the former is thereby estopped to plead *nil habuit in tenementis*. 6 *T. R.* 63. and see 7 *T. R.* 537. 1 *T. R.* 86; or that there was no demise. 1 *Leon.* 156. But where B. bargained with a patentee for the use of his invention, and covenanted to use it in a particular manner; in an action on the covenant, B. is not estopped to plead that the invention is not new, or that the plaintiff was not the original inventor. 3 *T. R.* 438.] So, if a lease be by the husband and wife; after the death of the husband, the lessee shall be estopped to say that the wife had nothing in the premises. *R.* 1 *Rol.* 872. l. 45. [but see *Cro. El.* 700. cont.] So, a man may be estopped by an acquittance or defeazance by indenture or deed-poll: *Co. Lit.* 352 a.: [as if one give an acquittance under seal for rent due such a day, he is thereby estopped to demand rent due at a day before; 1 *Lev.* 43. 1 *Sid.* 44. *T. Raym.* 21. and see 3 *Co.* 65. *Dy.* 271. 1 *And.* 14. *Bendl.* 186. *Moor*, 87; although if not under seal, it would be no estoppel, but matter of evidence only. *Comb.* 59. 2 *T. R.* 366. and see 1 *Camp.* 392.] If, however, the condition of a bond be in general terms, as, for instance, to perform all agreements now set down by A., the obligor is not estopped by it, but may say that no agreement was then set down by A. *R.* 1 *Rol.* 872. l. 25. So if the condition be, to carry away all the marl in such a close, he may say that there was no marl there. *R.* 1 *Rol.* 875. l. 35. Or if it be to release all his right in B., he may say that he has not any right there. *Per Twisd.* 872. l. 37. [*Qu. vide supra.* So, a lessee is not bound by the description of land in a lease, he may put in issue the fact whether a field called L.'s meadow were meadow, land or not. 1 *Str.* 610. So, a lessor is not estopped by his deed from going into evidence to shew that a cellar, which is situate under the demised premises particularly described, was not intended to be demised. 1 *T. R.* 701.] So

• a deed-poll does not estop a lessee, grantee, &c. ; for it is the deed of the lessor, grantor, &c. only. Co. Lit. 363 b. Com. Dig. Estoppel, A. 2.

Thirdly, A man may be estopped by matter in *pais*, which is not in writing : as if a husband, seised in right of his wife, enfeoffed A., who afterwards demises to husband and wife for life though the wife be in her remitter, and A. have not any reversion, yet in waste against the husband and wife, the husband is estopped to shew such remitter, against his feoffment and acceptance of estate from A., though it was not in writing. Lit. s. 666, 667. So if a wife bring dower, and recover, she shall be estopped afterwards to claim land settled upon her for jointure ; though she had entered clandestinely into the land settled for her jointure, before the writ of dower brought. 1 Rol. 862. l. 20, 25. 4 Co. 5. So a man may be estopped by acceptance of rent ; or by entry, livery, [partition] or the like. Co. Lit. 352 a. Com. Dig. Estoppel, A. 3. As to the acceptance of rent, it may be necessary here to make a few observations. Where the non payment of rent gives a power of entry to the lessor, and the lease becomes thereby voidable, the acceptance of rent afterwards is a waiver of the forfeiture, and the lessor thereby caps himself to enter or bring an ejectment ; but when the lease becomes void by the non-payment of rent, no subsequent acceptance of rent will have the effect of a waiver or estoppel. Thus where a lease gives merely a power of entry upon non-payment of rent, here the non-payment of rent makes the lease voidable only. So in a lease for life, if even the words be that it shall be void upon the non payment of the rent, yet in such a case it is avoidable only by entry, and not void ; and for this reason, because an estate which commences by livery, cannot be determined before entry. But in a lease for years, if the words be that upon non-payment of rent it shall be void, it is void in such a case, and not merely voidable ; and an acceptance of rent afterwards is no waiver of the forfeiture, nor does it estop the lessor to enter. 1 Saund. 287. (n. 16.) and the authorities there cited.

Where a copyholder has been admitted to a tenement, and done fealty to the the lord of a manor, he is estopped, in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. *Doe v. Budden*, 5 B. & Ald. 626.

In what Cases not.] But a man shall not be estopped by a record which was *coram non judice* : as by the record of a foremedon sued in the court of King's Bench. 1 Rol. 863. l. ult. Com. Dig. Estoppel, E. I.

So, a man shall not be estopped, where the truth appears by the same record &c. Co. Lit. 352 b. As if a fine be levied or concord made upon an original, on which a *retraxit* is entered, the parties are not estopped by it. Id. So, if an impropriation be to a bishop of a rectory,

after the death of the incumbent ; and by indenture, shewing that matter, the bishop demise the rectory for years during the life of the incumbent, and the lease is confirmed by the dean and chapter ; the bishop is not estopped by the indenture of demise ; for it appears by the same deed that he had nothing in the rectory. *Id.* Com. Dig. Estoppel, E. 2.

So, a man shall not be estopped to aver a thing which is consistent with the record, writing &c. : as, if A. B. senior, and A. B. junior, be bound in an obligation conditioned that the said A. B. shall not resort to such a woman &c., it may be averred that A. B. *junior was intended. *Semb.* 3 Mod. 216. If a deed, release &c. be inrolled upon record, the defendant may plead that " nothing passed by the deed," or " not seised at the time," &c. ; for these pleas are consistent with the record. 1 Rol. 862. pl. 35. So, if an obligor, being warned in detinue brought for the obligation itself, plead " conditions not performed ;" he may afterwards, in debt against him upon the obligation, plead a special *non est factum*. *Semb.* 1 Rol. 862. l. 45, 50. [So in detinue for a bond of the plaintiff, it is no plea to say that the bond was made to such a person, who brought an action upon it against the plaintiff and that the plaintiff pleaded *non est factum*. 29 H. 6, 45. In debt against two as administrators of A., it is no plea to say that the plaintiff has another action pending against other persons as the executors of A. 3 H. 6, 14. So, in a writ of escheat, it is no plea to say that the demandant, in another suit, vouched a person as heir of him whom he now supposes to have died without heir. *Id.* Doct. Pl. 158.] So if a man purchase a charter for licence to alien his land, he is not thereby estopped from afterwards traversing the tenure of the king. 1 Rol. 864. l. 3. So if A. demise two closes called Lane's Meadows, the lessee is not estopped to say they are arable and not meadow. R. 2 Mod. 312. [See ante, p. 206.] Com. Dig. Estoppel, E. 3. So, it is now holden that a party, in pleading, is not estopped to say that a writ was sued out on a different day from that which appears in the *teste* ; 3 Bur. 1423 ; although formerly it was ruled otherwise. *Lutw.* 334. See 1 Lev. 173. 1 Sid. 271.

Also, as an estoppel must be certain to every intent, Co. Lit. 352 b. 303 a, therefore if a thing be not directly and precisely alleged, it shall be no estoppel : Co. Lit. 352 b. : as, if a defendant plead " within age," viz. *ætatis 14 et non amplius*, and, after judgment, bring error within seven years, and assign errors by attorney ; he shall not be estopped to say that he was of full age at the time errors were assigned ; for the allegation after the viz. that *fuit ætatis 14 et non amplius*, is not positive R. T. Jon. 170. [Skin. 10. T. Raym. 456.] So if a man plead a licence or pardon of alienation, he is not thereby estopped to say, upon another

alienation, that he does not hold *in capite* ; for the licence says, *quæ tenentur de nobis in capite, ut dictur*, which is not positive, and the plea was not more so. 4 Inst. 111. So if the matter be alleged by way of argument or inference, or if it be by way of recital, it is no estoppel. Co. Lit. 352 b. Com. Dig. Estoppel, E. 4.

So if a thing be alleged only as a supposal in a count, it shall not be an estoppel. Co. Lit. 352 b. [but see ante, p. 205.] As, if in a *scire facias* on a fine, the plaintiff make himself heir by lineal descent, he may vary in his decent in a second *scire facias*, if it were a mistake in the first. 1 Rol. 864. l. 27. Com. Dig. Estoppel, E. 5.

So if the thing alleged be not traversable or material, it shall not be an estoppel : Co. Lit. 352 b. : as in debt on an obligation alleged to be made at A. ; the plaintiff, in another action on the same bond, may say that it was made at B. 1 Rol. 864. l. 25. [3 H. 6, 14.] So, if in error on a judgment 20 Car. 2, it be assigned for error that the defendant was within age, *viz. ætatis 14 annorum* ; though the error were assigned 26 Car. 2, and in both cases the party appeared *by attorney, yet the judgment was reversed ; for the words after the *viz.* were not material or traversable, and he was not concluded by them. R. T. Raym. 456. [Vide supra.] So, if upon a distress for rent, the tenant prays in aid, alleging that he has a lease for 10 years, he is not estopped afterwards to say that he has a lease for 60 years ; for in *aide prier*, if he be lessee, it is not material for what term. T. Raym. 457. So, in rescous of a distress for rent of a house and one acre, the plaintiff shall not be estopped because he on a former occasion avowed for the same rent as issuing out of a house and five acres. Id. [And see 1 Lev. 43 Comb. 59, 60.] So, if A. claim under a deed to B. and C. and the heirs of their bodies, remainder to D. ; and that upon the death of C. without issue, B. aliened to A., and D. entered ; and issue is joined that at the time of D.'s entry, C. was alive, and this is found by verdict : after C.'s death, D. shall not be estopped to plead that nothing passed by the deed. T. Raym. 457. Com. Dig. Estoppel, E. 6.

So, acceptance of rent &c. by one, who at the time had no title, shall be no estoppel. Co. Lit. 352 b. Com. Dig. Estoppel, E. 7.

So if any interest pass from the party, there shall be no estoppel : as if lessee for the life of B., lease for 21 years, and afterwards purchase the fee, and B. dies ; he shall avoid his lease for years, though it were by indenture ; because an interest for the life of B. passed by his lease. Co. Lit. 47 b. Moor, 20. [So if tenant for life make a lease for years and die ; in an action of covenant by his heir, the lessee is not estopped to say that the lessor was tenant for life only, and that the lease determined by his death ; 2 Wils. 143 ; and upon the same prin-

ciple it seems that the lessee is not estopped from shewing that his lessor was only scised in right of his wife for her life, and that she died before the covenant was broken: 8 T. R. 487: for in both these cases an interest passed to the lessee at first by the lease, and therefore he is not estopped from shewing the facts which afterwards determined it. 6 Co. 15 a. 2 Saund. 418. (1).] If A. be tenant for life, remainder to B. in fee, and A. and B. join in a lease; if the lessee bring an ejectment on the joint demise of both, in the life-time of A., he shall not recover; for it was the demise of A. only; and they shall not be estopped by the indenture from saying so, because an interest passed from both. Co. Lit. 45 a. If A. by indenture demise to B. the herbage of his land, B. is not thereby estopped to say that A. had nothing in the land: for the lease was not of the land. Co. Lit. 47 b. Com. Dig. Estoppel, E. 8.

So, an estoppel against an estoppel sets the matter at large; as, if A. claim common by grant, and in another action against the same defendant, claim it by prescription, and the defendant admit it; A., who was estopped by his former claim to allege prescription, is let in to do so by the admission of the defendant. 1 Rol. 874. l. 50. [See also Comb. 446.] So if a defendant plead joint-tenancy with B., and the plaintiff say that he is sole tenant; the defendant may vouch as sole tenant, for the plaintiff is estopped to gainsay it. 1 Rol. 875. l. 5. Com. Dig. Estoppel, E. 9.

When it determines.] An estoppel determines by *cesser* of the act, deed &c., from which it arose: as, if a man make a lease of his own land for years by indenture; when the lease determines, it shall be a determination of the estoppel. Co. Lit. 47 b. If A. accept a lease from B. and his wife, where the wife has nothing; after the death of the husband the estoppel ceases, and *nil habuit* may be pleaded in bar to an action by the wife. R. Cro. El. 700. [but see 1 Ro. Abr. 872. l. 45. semb. cont.] Com. Dig. Estoppel, F. So if tenant for life make a lease for years, after the lessor's death the lessee is no longer estopped by the lease, but to an action of covenant by the heir he may plead that the lessor had but a life estate. 2 Wils. 143, and see 8. T. R. 487.

Who bound by it.] All parties and privies are bound by an estoppel. Pollexf. 61. W. Jon. 460. Thus, a privy in blood, as the heir, shall be bound by an estoppel: Co. Lit. 352 a.: as, if a contingent remainder be to A. in fee, who makes a lease by fine or indenture, and dies before the contingency happens; his heir shall be estopped by the lease. R. Pollexf. 61, 66. If the eldest son of tenant in tail levy a fine, and then his father dies, and he himself afterwards dies without issue; his younger brother shall be estopped by the fine, for he must derive his title as

heir to him; Pollexf. 61; and this, although there was no interest at the time the estoppel was created, but the interest accrued afterwards to the ancestor. R. Pollexf. 66. [But if the heir apparent of a copyholder in fee, surrender in the life-time of his ancestor, and survive him, his heir is not estopped by such surrender to claim against the surrenderee. 3 T. R. 365. So, devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest: or if they do, such surrender will not operate by way of estoppel against them or their heirs. 11 East, 185, and see 2 New. Rep. 491.] So, a privy in estate shall be bound by an estoppel: [see 9 H. 6, 67:] as, if A. demise the manor of D. by indenture for years, and afterwards purchase the manor and sell it to B.; B. shall be estopped to say that A. had nothing in the manor at the time of the lease. 1 Salk. 276. [So the assignee of a lease by indenture, is estopped by the deed which estops his assignor. 2 Taunt. 278.] So, if there be judgment in a *scire facias* upon a judgment of Trinity term, after *nul tiel record* pleaded; whereas in truth the judgment was of Michaelmas term: the party to the judgment, and all who claim under him, shall be bound by this estoppel. R. 1 Salk. 276. [See 9 H. 6, 67. 3 East, 346.] So, a privy in law shall be bound by an estoppel: as, the lord by escheat, Co. Lit. 352 a., tenant in dower or by the courtesy, Pollexf. 61. Co. Lit. 352 a. and every one who claims under another by act of law or in the post, Co. Lit. 352 b. Com. Dig. Estoppel, B.

But in general a stranger shall not be bound by an estoppel. Co. Lit. 352 a. [see 2 Str. 960.] So a woman shall not be estopped, after coverture, by an admission on record by her and her husband during coverture; as if husband and wife admit B. to be a *mulier*; in another action by B., after the death of the husband, the wife may plead that he is a bastard. 1 Rol. 865. l. 10. If husband and wife plead a feoffment; the wife after the death of the husband may say that nothing passed by the feoffment. 1 Rol. 865. l. 5. So if *husband and wife make a lease, where the wife has nothing; after coverture, she shall not claim by estoppel. Cro. El. 700. [See 1 Ro. Abr. 672. l. 45.] So, an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir to his mother: as if a woman, who had an estate for life, recover in a *cui in vita* against the donee of her husband, supposing that she had the fee, and afterwards make a feoffment and die, and the donee die without issue; the heir of the father shall recover against the feoffee of the mother, though heir also to her, and shall not be estopped by the record of the judgment in the *cui in vita*, which affirmed the mother to have a fee. Co. Lit. 365 b. So, if a son be estopped by his pleading upon record, and die, his uncle and heir shall be bound;

but if the uncle die, and the land descend to the father, the father shall not be bound by the estoppel of his son, for he cannot be heir to him. Co. Lit. 12 a. So, if the heir do not claim the land from him who made the estoppel, but by his own purchase, or from another ancestor, he shall not be bound by the estoppel, even although he derive his blood from the party to the estoppel. W. Jon. 460, 461. Com. Dig. Estoppel, C.

Who may take advantage of it.] An estoppel is reciprocal, and binds both parties; Co. Lit. 352 a. and see Cro. El. 700; and therefore either may take advantage of it. And not only the parties, but their privies in blood, as heirs,—privies in estate, as feoffee, lessee, assignee &c.—privies in law, as lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that claim under the parties by act of law or in the post, may take advantage of an estoppel. Co. Lit. 352 a. Thus, a woman who claims dower, may take advantage of an estoppel by deed between her husband and his tenant. 1 Rol. 868. l. 47. So, if A demise by indenture to B. for life, and afterwards by fine grant the reversion; the conusee shall estop B., in a *quid juris clamat*, to say that A. had nothing in the premises. 1 Rol. 868. l. 50. So, if a man recover a rent charge against B. out of his land, and B. afterwards sell the land to another; the vendee shall be estopped by the recovery, and the recoveror shall have advantage of the estoppel. 1 Rol. 868. l. ult. [So where lands are leased by indenture, and the reversion afterwards sold, the vendee shall have advantage of any estoppel arising from the deed, as the estoppel runs with the land. 2 Str. 817. 2 L. Raym. 1550.] So, an officer in the execution of process, shall take advantage of an estoppel upon record in the same action: as if a feme covert be sued as a feme sole, and judgment be against her as such, the sheriff shall take her in execution though she be the wife of another and have another name. 1 Salk. 310. R. 1 Rol. 869. l. 50. So if a man be sued as a knight and baronet, though he be not a baronet, and the sheriff take him in execution; he shall not have an action against the sheriff. R. 1 Rol. 869. l. 45. [So, if an executor or administrator admit assets, though he have them not, the sheriff may return a devastavit. R. 1 Salk. 310.] So the king shall have advantage of an estoppel, though he be not a party to the record; for he is always present in court. 2 Inst. 39. So any person may take *advantage of a disability which appears by record; as outlawry, ex-communication, attainder, *alienee* &c., though he be a stranger to the record; Co. Lit. 352 b. 128 b.; and the same of bastardy, mulierty &c., certified. Co. Lit. 352 b. But of a record concerning the name, quality or condition of a man, no stranger shall have ad-

vantage, for he is not bound by it. Co. Lit. 352 b. [Keilw. 96. 180.] So, a stranger shall not have advantage of villenage confessed or found, but the lord only. Co. Lit. 128 b. Com. Dig. Estoppel, D. and see 3 H. 6, 26. 36 H. 6, 32, 33. 37 H. 6, 32. Doct. Pl. 164, 165.

How.] If the matter of estoppel appear upon the record, it need not of course be pleaded, but the adversary may take advantage of it by a general demurrer. 2 Str. 817, 2 L. Raym. 1550. But if it do not appear upon the record, it must be pleaded. 2 Barn. & Ald. 662, and see 3 East, 246. The form of the plea is thus:—

*In the ["King's Bench," "Common Pleas," Exchequer
of Plea.]" Trinity Term, 5 Will. 4.*

J. S. } "And the said J. S. saith that he the said J. N. ought not
ats. } to be admitted to say or allege that" [stating the matter you
J. N. } conceive the plaintiff was estopped from alleging in his
declaration]; "because he saith that" [here state the matter of record,
deed or matter in pais, by which the plaintiff is estopped]: "And this
he is ready to verify. Wherefore he prays judgment if the said J. N.
ought to be admitted, against the said fine with the said proclamations
levied in the manner aforesaid" or [against his own acknowledgment by
his deed aforesaid" [or as the matter of estoppel may be] "to say or
allege that" [stating the matter the plaintiff was estopped from alleging,
as in the beginning of the plea, and then adding an, &c.]

It is not merely matter of form to conclude the plea thus with relying upon the estoppel; for by not doing so, the party may often lose that advantage of the estoppel which the law gives him. See Hob. 206, 207. 22 H. 6, 53. 38 H. 6, 29. 11 Co. 52 a. As, where in debt for rent on a demise, by one who had nothing in the land, the defendant pleads *nil habuit in tenementis*; if the plaintiff reply that he had a sufficient estate to make the demise, he loses the benefit of the estoppel; but if he reply that the lease was made by *indenture*, and conclude, *unde petit judicium*, if the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture. 2 L. Raym. 1051. 1 Salk. 257. 6 Mod. 258. 2 L. Raym. 1054. 6 T. R. 62, or if the declaration stated that the lease was made by indenture, and the plaintiff demur, 2 Str. 817. 2 L. Raym. 1550. 1 Saund. 325. (n. 4.) the defendant shall be estopped.

However, although the estoppel be not pleaded, the jury may find it specially, and the court will thereupon give judgment accordingly. See Com. Dig. Pleader, S. 5, Estoppel, E. 10. Doct. Pl. 164. 2 Barn. & Ald. 662.

But where at the trial of a cause, the plaintiff gave in evidence a deed between him and the defendant, a recital in which directly contra-

dicted the defendant's plea: it was holden, that as the estoppel was not pleaded, the defendant was not precluded by the deed from submitting his defence to the jury. *Bowman v. Rostron*, 2 Ad. & E. 295, n.

**11. The Manner of stating the Matter of the Plea.*

It must agree with the Declaration in Time.] We have seen (ante, p. 113. 102.) that in a declaration the day and year laid are not material, excepting dates of bills of exchange, deeds and other written instruments, and the dates of records or other time to which they relate; and except where the time forms an essential part of the cause of action. In all other cases the plaintiff is not tied down in his evidence to the time stated in his declaration, but may prove the fact to have happened at any other time, without being subject to objection on account of the variance. The same rule prevails in pleas. And it is a general rule, that where the time is not material to the defence, the plea must follow the day laid in the declaration, otherwise it will be bad upon special demurrer. 1 Saund. 14. 2 Saund. 5. (n. 3.) Lutw. 14. And see 2 Str. 954. Hardr. 40. So, where the time laid in the declaration is immaterial, it cannot be traversed by the plea, unless it be essential to the defence that the time should be stated truly: and therefore a traverse of a surrender of a copyhold to such a steward on such a day, is bad, for the day is unnecessarily made a part of the issue; the traverse should have been of the surrender *modo et forma*. R. Yelv. 122. 2 Cro. 202. So in debt on a recovery in an inferior court holden on the 1st of May, a traverse of a recovery in a court *ten'* 1 May, is bad, for the same reason. R. 1 Lev. 193. And see 3 Lev. 41. Latch. 92. Cro. Jac. 501.

But when it is material to the defence, that the day laid in the declaration should be stated according to the fact, the plea in that case may vary from the declaration in the day laid, and no advantage can be taken of the variance: as, where the defendant justifies a trespass by reason of a warrant or process, and the day is not laid in the declaration according to the fact, it is material to the defence that the real time when the act complained of was committed should be shewn, in order that it may appear to have been done at a time when it was authorized by the warrant or process. So, where the defendant justifies by reason of a temporary office, such as that of sheriff, mayor, &c. it may be material for the defendant to shew the time at which the fact complained of actually took place, in order that it may appear to have occurred whilst he was in office. There are two modes of doing this in pleading:

namely, by justifying on the day on which the fact complained of actually occurred, and concluding with a special traverse of the day laid in the declaration, and of all days before or since; see Com. Dig. Pleader, G. 2, 16. Bac. Abr. Pleas, H. 5. and see 1 H. 7, 9. L. 5. E. 4, 12. 12 E. 4, 6. 21 H. 6, 40. 22 H. 6, 49 b. 50 a. 19 H. 6, 47. Doct. Pl. 357. 367, 368, 369.; in which case the plaintiff has his option, in his replication, either to join in the defendant's traverse of the day, or to traverse the justification. See ante, p. 193. Or instead of concluding thus with a special traverse, he may conclude with an averment that the matter of the justification is the same trespass which the plaintiff complains of, (see ante, p. 202,) which is equivalent to a traverse that the trespass was committed at any other *time than what is stated in the plea. 1 Saund. 298. (n. 2.) and see Com. Dig. Pleader, E. 31. 2 Saund. 5. (n. 3.) 1 Bulst. 138. Cro. Car. 228. T. Jon. 146. The former is according to the ancient mode of pleading; the latter, that which is uniformly adopted in modern practice. But the defendant cannot conclude with a *quæ est eadem*, and a traverse also; the addition of a traverse in such a case will make the plea bad on special demurrer. 2 Saund. 5. (n. 3.) 2 Lutw. 1457. 1 Str. 694. Fortesc. 379. 389.

Also, where the time is material, according to the rule laid down ante, p. 113. 102. 213, as where the defendant pleads a deed or other written instrument, or a record: the dates of the written instruments, and the dates of the records or other time to which they relate, must be correctly stated in the plea, in the same manner as in a declaration. Thus, if the defendant plead a release he must shew the day of the making of it. Plowd. 31 a. So if he plead a lease and release, he must shew the day of the making of the lease. 32 H. 6, 8, as well as of the release. And the same of a deed of defeazance, Dy. 26 b. 27 a. And see 2 Mod. 33, and the like.

It must agree with the Declaration, in Place.] Formerly where the matter of justification was not local but transitory, the defendant in his plea was obliged to lay it at the place mentioned in the declaration; but as by Reg. Pl. H. 4 W. 4, l. s. 8. "no venue shall be stated in the body of the declaration or in any subsequent pleading," no place is in such cases laid in the plea.

Where in trespass for an assault in the county of A., the defendant justified in defence of his dwelling-house in the county of B., concluding his plea with a *quæ est eadem*, and also a special traverse of the place laid in the declaration: the court held this bad, on special demurrer. *Hunbrow v. Bailey*, 3 Tyr. 152.

But where the matter of justification is local, as if in an action for a trespass, &c. in Middlesex, the defendant justify as constable of the vill

of B. in another county, or in another place in the same county, arresting the plaintiff for a breach of the peace : or justify as justice of the peace in another county ; or justify because the plaintiff offered to enter into his house in another county, or in another place in the same county ; the defendant must traverse not only the county of Middlesex, but also every other county or place except that to which his justification is confined. 2 Saund 5. (n. 3.) and see 1 Wils. 81. 219. 14 H. 6, 21. 27 H. 6, 1 a. Co. Lit. 282 b. Lutw. 1437. Cro. El. 667. So, in trespass for taking goods, if the defendant justify damage feasant in such a close or house, he must traverse all other places. Co. Lit. 282 b. Lutw. 1437. R. Cro. El. 705. So, if a man justify at another place as sheriff, he must traverse all places except his own county. Cro. Jac. 372. R. Cro. El. 504. 860. 868. So if he justify as other officer, he must traverse all places but those within his authority. Sav. 25. 27. Or if he justify by process out of an inferior court, he must traverse all places out of its jurisdiction. Semb. 1 Rol. Rep. 264, 265. Lutw. 1563. Or if he justify by *moliter manus imposuit* for entering his house at A., he must traverse all other places. R. Cro. El. 705. 1 Rol. Rep. 19. R. Lutw. 1437. So, if he justify as for a distress for rent, he must traverse all places not demised ; R. 1 Sid. 293, 294 ; as, where in trespass for taking goods, the defendant pleaded that he let a house in St. Paul, Covent Garden, to the plaintiff, and distrained the goods for rent, and traversed that he was guilty in London or out of St. Paul, Covent *Garden ; upon demurrer the traverse was holden ill, because the defendant might be guilty in another house within Covent Garden. Id. The traverse in the latter case should have been thus : " Without this that he the said J. S. is guilty of the said trespass in London aforesaid, or elsewhere, except in the said dwelling-house in St. Paul, Covent Garden, aforesaid." When a plea is thus pleaded with a special traverse of the place, the plaintiff in his replication may either join in the defendant's traverse, or traverse his justification, at his option. Ante, P. 193.

It is perhaps doubtful if a conclusion of *quæ est eadem* would not be deemed equivalent to a traverse in these cases, in the same manner as where the plea varies from the declaration in time, as before mentioned. See Latch. 201. 1 Bulst. 136. 9 H. 6, 30 a. Cro. El. 667. and Com. Dig. Pleader, E. 31. But until some modern decision occur upon the subject, it is safer to adhere to the ancient precedents, and add a traverse. See 2 Saund. 5. (n. 3.)

At common law, when issue was joined upon a local justification, the jury must have come from the place mentioned in the plea, and not from that mentioned in the declaration : otherwise it was error. 8 E.

3. 8. 20. 22 E. 3, 16. 53. Cro. El. 870. 2 Ro. Abr. 598. pl. 3, 4. Hob. 5. 76. Yelv. 49. Cowp. 165. 1 Saund. 247. (n. 1.) and see Com. Dig. Action, N. 12. But the law has been altered in this respect by the stat. 16 & 17 Car. 2. c. 8, and 4 Ann. c. 16. s. 6; and it is now the practice to try the cause in the county laid as venue in the declaration. 2 Saund. 5. (n. 3.) 1 Saund. 247. (n. 1, 2, 3.)

It must agree with the Declaration in other respects.] The plea must also correspond with the declaration in other respects. Thus, *nil debet* is no answer to an action of assumpsit; 4 Taunt. 164. Barnes, 257; nor *non assumpsit*, to an action of debt; 6 East, 549; and in these cases the plaintiff may either demur, or he may treat the plea as a nullity, and sign judgment as for want of a plea. See 1 Arch. Pr. C. P. [80.] 111. It is aided however after verdict. Cro. El. 470. Alleyn, 76, 77. 2 Salk. 734, 735. 2 Str. 1022. So, where the plaintiff declared against an abbot on his own deed, and the defendant pleaded as to a deed by him and his convent: the court held it to be no answer to the declaration. 21 H. 6. 9. 21 H. 6. 3 b. So, in an action by the assignee of a bankrupt or insolvent debtor, upon promises to himself as assignee, it is no answer to say that six years had elapsed since the cause of action accrued to the insolvent or bankrupt; for the declaration is not on a promise to the bankrupt, &c., but on a promise to the assignee. 2 H. Bl. 561. 2 Str. 919. So, to an action for waste in six acres of wood, if the defendant justify in one acre of land, the plea is bad, for it is no answer to the declaration. Dy. 75 a. Doct. Pl. 56. See 1 Bing. 18. Where the defendant however is obliged in his plea to vary from the declaration in the name or description of things or persons, it may be good by an averment that they are the same persons or things mentioned in the declaration: [Dy. 357 b.] As in an information for intrusion into lands in N. Dale, if the defendant plead a grant of lands in S. Dale, he must aver that N. Dale and *S. Dale are the same. Sav. 48. So, in process for a fine for alienation of a messuage and 20 acres of land without license, where the defendant pleaded a licence of alienation for a rectory and 20 acres of land, the court held that he should have averred that the messuage was parcel of the rectory. Sav. 14. So, in assumpsit for 50*l.* for oaks sold, the defendant pleaded a contract for oaks by indenture, and the court held that he should have averred them to be the same oaks. Sav. 17. So, in an action against the executor of H. de B., if he plead a judgment against him as the executor of H. de C., he must aver that H. de B. and H. de C. are the same persons. R. Sav. 92. On a *quo warranto* for having a park within the metes and regard of a forest, if the defendant prescribe for a park *infra metes*, this is not sufficient, without also averring

it to be *infra regard* of the forest also. Bridg. 25. And if the thing to be averred, be repugnant in words, but not in truth, it ought to be explained before the averment is made: as, if a grant be of land in A., to an information for land in B., it cannot be averred to be the same land, unless it be explained that A. is a vill in the parish of B. or is known by the name of B. as well as A., and then it may be averred to be the same land. Sav. 38. Com. Dig. Pleader, C. 76. But where the plaintiff declared for a breaking of his close by the defendant, and the defendant justified a breaking by his cattle, it was holden sufficient without such averment; for the act of the cattle is deemed the act of the master. 21 H. 6, 5.

It must be certain.] The matter of a plea must be stated with certainty. And therefore if the defendant plead that he has expended 810*l.* for repairs *et alia onera necessaria*, it is bad for uncertainty; for he should shew for what charges he has expended the money, in order that the court may judge whether they were necessary or not. R. 1 Saund. 49. So, in debt on bond conditioned to make assurance of land, if the defendant plead that he executed a release, it is bad, unless he shew that it concerns the same land. 2 Co. 4 a. [So if the condition of a bond be to surrender a copyhold, the defendant cannot plead generally that he surrendered it, but must shew especially at what court, and when holden, &c. Winch. 11. Or if the condition were to ratify and confirm such a demise, it is not sufficient to say that he ratified and confirmed, but he must shew how, and plead the confirmation by deed. Dy. 229 b.] If the defendant plead that he paid so much money as the plaintiff merited, without saying what sum he paid, it is bad. R. March. pl. 120. So, if a man be bound to give all the money in his pocket, if he say that he gave all, it is bad; for he should shew what sum he gave. Latch. 16. So, if he be bound to convey all his land, and he plead that he has conveyed all, it is bad, for the same reason. Id. [and see Dy. 28. a. So, in an action upon an agreement to deliver to the plaintiff all the deeds and evidences concerning certain lands, it is no plea to say generally that he had delivered all the deeds and evidences, without shewing what deeds &c. in certain. 9 E. 4. 19 a.] So, if a man be bound to pay all charges to A.'s attorney, expended in such a suit; if he plead that he paid all the charges in that suit, it is bad; for he should have shewn that the *charges amounted to so much, and that he paid them. R. Lutw. 421, 422. So, if the defendant plead that A. has paid all debts to the plaintiff, he should shew what debts, &c. R. 3 Leon. 3. Moor. 12. [So, in debt on bond conditioned to render an account of all rents of a manor received by him, before such a day: if the defendant plead that he has

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accounted for all the sums before such a day, it is bad; for he should shew the particular sums. Cro. El. 749. cit. So, if the condition be, that the defendant shall deliver briefs to all churches within such a time, and shall collect the money given upon them, and deliver it over to the plaintiff: the defendant cannot plead generally that he delivered the briefs, collected the money, and paid it to the plaintiff, but he must shew what briefs were delivered, what sums collected, and what paid over to the plaintiff; because each of these facts lies within his knowledge. 1 Sid. 215. and see 1 T. R. 753. per Buller. So, if a man be bound to discharge another of a bond &c. he cannot plead generally that he discharged him, but must shew how, as by release &c. 35 H. 6. 10 b, 11. 22 E. 4. 40. In waste, if the defendant plead that he sold the trees to him, he must say for what sum. Dy. 90 b. So, where in debt for rent, the defendant pleaded *nil habuit in tenementis tempore dimissionis*, and the plaintiff replied *quod habuit in tenementis*, without shewing what estate; this was holden bad on demurrer; for he might have an interest in the tenements, and yet not such as he could demise. Cro. Car. 312. See also 22 H. 6. 24. 39 H. 6. 6.] So, if he say he made an estate by the advice of B., without saying what estate, it is bad. Hob. 295. If he plead that he levied part of the money, without saying how much, it is bad. R. 3 Leon. 223. So, if he justify a taking for a contempt *tam verbis quam factis*, without shewing what the words or facts were, it is bad. R. 2 Leon. 34. [So, in an action for libel, a justification generally in the words of the libel is not sufficient: 1 T. R. 748: as in an action for charging the plaintiff with being a swindler, the plea must state the particular instances of fraud by which the defendant means to support his justification. Id. So, in an action for a libel charging an attorney with misconduct, &c., the justification must set forth the particular instances of misconduct, &c. 1 Taunt. 543. If an award be to do one of several acts in the disjunctive, the defendant cannot plead performance generally, but he must shew particularly what part of the award he performed. 27 H. 6. 1. So where a bond is conditioned for the performance of several particular things, the defendant cannot plead a general performance, but must set forth particularly in his plea how he has performed each particular thing, and lay a time and place of performance. 1 Sid. 215. 1 Lev. 303. Cro. Jac. 359. 1 Bulst. 43. 1 Show. 1. But where the condition is for the performance of all the covenants in an indenture, the defendant may plead performance generally, and it shall then be for the adversary to shew the contrary in some particular; Co. Lit. 303 b. Cro. El. 749. 1 Lev. 303. 1 Sid. 215. 2 Saund. 411; unless some of the covenants be in the negative, for to these he must give a special answer

in the negative; Co. Lit. 303. Moor, 856. Cro. El. 691. Sty. 163; or in the disjunctive, for then he must shew which of them he has performed. Co. Lit. 303 b. 1 Lutw. 581. *1 Saund. 117. (n. 1.) Bac. Abr. Pleas, l. 3.] If he plead an excuse of his performance, he should shew that all was done by him that he could do. R. 1 Show. 335. If he plead the taking of a ship as a prize, he should shew a cause of forfeiture. R. Carth. 32. If the condition of a bond be to deliver at such a day, it is not sufficient to say he delivered *secundum formam conditionis* without shewing what and at what time in certain. Semb. 1 Lev. 145. So, if it be to enjoy an office according to letters-patent, he ought to shew the effect of the patent, and that the plaintiff enjoyed accordingly. Hob. 295. If the defendant plead a feoffment to a use, he must shew a seisin at the time of the feoffment, otherwise the plea is bad. Kit. 228 b. So, if he plead a lease and release, he must shew a possession in the lessee at the time of the release. 7 H. 7. 3. [So, in pleading a will of lands by tenant in fee, it must be stated to be in writing and must appear to have been executed in the manner required by the statute of frauds. 1 Saund. 276 a. (2.) So, in pleading an assignment, of a term for years, or a demise for more than three years, or a promise to be answerable for the debt of another, it must be stated to be in writing; Id. T. Raym. 450; although we have seen that this is not requisite in a declaration. Ante. p. 95.] If the defendant plead an entry by the command of *cestui que use*, he must shew that he was seised to the use. Kit. 228 b. If he plead a re-entry for non-payment of rent, he must allege a certain demand. R. Alleyn, 19. R. Hob. 331. [See 2 Arch. Pr. C. P. 50.] If he plead a descent to him as heir, he must say how he is heir. 1 Lev. 190. [In trespass, if a woman justify as tenant in dower, it is not sufficient to say generally that she is so, but she must state it specially, namely, that such a person being seised took her to wife, that they had issue, that her husband died, and that the issue entered and endowed her. Per Cur. 37 H. 6. 38. Doct. Pl. 63.] If the defendant in trespass *quare clausum fregit* plead *liberum tenementum*, he must say at the time of the trespass, otherwise the plea is bad. Pollexf. 132. [So, where in trespass the defendant pleaded that A. was seised of the manor, of which the *locus in quo* was parcel &c.; the court held that he should have stated it to have been parcel at the time of the trespass. 32 H. 6. 24. So, where a defendant justifies for tithes as parson, he must say that he was parson at the time of the severance of the tithes from the nine parts, as well as at the time of taking the tithes. 35 H. 6. 48, 49. So, where a sheriff justifies by virtue of a *capias* directed to him, it must appear that he was sheriff at the time of the arrest, as well as at the time of his receipt

of the writ. 35 H. 6. 48, 49. So, if a man plead that he has another addition, he must say that he had it at the time of the writ purchased. 11 H. 6. 11 a. In trespass for impounding a mare, if the defendant justify because the mare was mangy, the plea must state that she was so when put upon the common, or that the plaintiff had notice of it before the distress, otherwise it is bad. Semb. 2 Wils. 96. In debt on bond conditioned to pay A., B. and C. 30*l.* each, *tam cito* as they should come of age; if the defendant plead that he paid those sums to A., B. and C. *tam cito* as they came of age, it is insufficient; for he should have stated the time, place, and manner of payment. Cro. Jac. 359, 2 Bulst. *267. If three several years be mentioned in the declaration, and the defendant in his plea state a fact as having occurred on such a day of December *anno regni regis nunc in narratione specificat*, not stating what year in certain, it is bad for uncertainty. Dy. 66 a.] If in trespass the defendant plead that three justices did not &c., he must say *nec eorum aliquis*. 2 Mod. 284. Com. Dig. Pleader, E. 5. So, if the defendant plead to a general demand or charge, he ought to answer to every part: as in waste for cutting down twenty oaks, he should say that he did not cut down the said twenty oaks or any of them. Cro. El. 84; and see 8 Taunt 190. So, in debt for 20*l.*, that he doth not owe the said 20*l.*, "or any part thereof;" or in case, for stopping up three lights, that he did not stop the said three lights, "or any one of them;" and the like. See ante, p. 192.

But certainty to a common intent is sufficient; Co. Lit. 303 a. [31 H. 6. 9. 5 Co. 121 a. Per Buller, 1 Doug. 153; by which words ("common intent") is to be understood, that when words are used which will bear a natural sense, and also an artificial one or one to be made out by argument or inference, the natural sense shall prevail. It is simply a rule of construction, however, and not of addition; common intent cannot add to a sentence, words which are omitted. Per Buller, 2 H. Bl. 530.] Therefore in assise, if the tenant pleaded that his father was seised, and died seised, and that he entered as son and heir, it was good; though it might be that the father of the demandant abated after the tenant's ancestor died and before his entry, but it should not be intended; for when he said that his father died seised and he entered, the common intendment was that he entered immediately. Plowd. 26. 28. 33. So, if a plea be, that the defendant surrendered and released a copyhold in full court, and the plaintiff accepted it, it is sufficient, though it be not said that the surrender was to the plaintiff's use, for that shall be intended. R. Cro. Car. 6. So, to debt on bond conditioned for the quiet enjoyment of land, a plea that *post consecrationem usque ad diem billas* the plaintiff enjoyed, is good, though it be not said *semper post*; for

that shall be intended. R. Cro. Car. 195. So in trespass, if the defendant justify as servant, without saying by command of his master, it is sufficient, for that shall be intended. So, if the defendant say that the master of a college and his fellows were seised in fee, it shall be intended in right of the college. Plowd. 102. If several writs be mentioned as having issued to the sheriffs of several counties, (one of which writs was an extent,) and it be said *quod prædict' sheriff returned &c.* the extent, it shall be intended the same sheriff to whom the extent was directed. Plowd. 65 b. Com. Dig. Pleader, E. 7. Where in debt against an executor on the bond of his testator, the defendant pleaded *non est factum suum*, it was holden that *suum* should be intended of the testator. Latch. 125.

But where any thing is omitted, which is necessary to give certainty to the statement, it shall be taken most strongly against the defendant. Co. Lit. 303 b. Plowd. 29 a. 3 H. 7. 2. Doct. Pl. 276.] Therefore in trespass, if the defendant plead a release, without saying at what time it was made, it shall be intended to have been made before the trespass; for this is most strong against the *defendant. Plowd. 46 a [and see Doct. Pl. 29, and the authorities there cited.] So in waste, if the lessee plead that it was for mines, without saying when the mines were opened, it shall be intended that they were opened after the lease; for that is most strong against the defendant. Per. Hob. 234. If the defendant plead that A. seised of a manor *unde locus in quo &c.* was parcel, demised his manor except B. &c.; it shall be intended that the *locus in quo* was parcel of B., if the contrary do not appear. R. Plowd. 104 a. So, if to debt on bond the defendant plead payment, it shall be intended after the day, if he do not say otherwise. Plowd. 104 a. *Indum fuit infra ætatem*, if the defendant pleaded a release by the demandant, without saying when, it should be intended within age. Plowd. 104 a. If a man plead *quod A. arrestat' et capt' fuit in Lond'*, without saying by what authority, it shall be taken to be an arrest by wrong. Dy. 120 a. [So, in trespass for taking corn, if the defendant justify for the toll of grain brought to market to be sold, and sold, the place of sale must be alleged; for it shall not be intended to have been sold in the market, unless it be so stated. R. Lutw. 1501. So, where a plea in bar to a cognizance in replevin stated that before the time the rent distrained for had become due, the plaintiff from time to time had been compelled to pay divers sums for land-tax, amounting in the whole to 52l. 14s. 3d., which the defendant as landlord was liable to bear; and as to the residue of the rent, a tender: the plea was holden bad on general demurrer, for not stating the specific periods for which the several sums had been assessed or paid, and for not stating that the payment

was made after the rent distrained for had accrued or was accruing. 3 Barn. & Ald. 516.] But it shall not be intended against the defendant, where such intendment is inconsistent with another part of the plea; as, a lease by a bishop shall not be intended to be made by one then alive, if the plea, afterwards say *per A nuper episcopum*. R. 10 Co. 59 b. Com. Dig. Pleader, E. 6.

Necessary circumstances, however, shall be intended; [that is, all circumstances necessarily implied from the matter stated, and without which such matter could not be as it is stated in the plea, shall be intended, and an omission of them shall not render the plea bad.] As if a man plead a feoffment, livery need not be alleged, for it shall be intended. Co. Lit. 303 b. [Cro. El. 401.] So, if the defendant plead an assignment of dower, it shall be intended to have been by metes and bounds; D. Cro. Car. 162. [Bro. Plead. 145; for otherwise it would not be a legal assignment.] So, if he plead a request by an inferior judge to a superior, to assume the jurisdiction of a cause out of the inferior ecclesiastical court, it shall be intended that the request was under seal. R. Cro. Car. 162. So, if he plead that the sheriff made a warrant, he need not say *sub sigillo*. R. Cro. El. 53. Palm. 357. So, if he plead that he is heir to A., he need not say that A. is dead, or had no son. Dalis, 67. [So, if he plead a surrender of a term for years, and that it was agreed to by the lessor, it is not necessary to say that the lessor entered, for it shall be intended. Cro. Car. 101. So, if a man plead a lease at will, by force of which B. entered and still is possessed, this implies that the lessor is alive. 10 Co. 59. Dy. *304. see ante, p. 110. 123.] So where the plea refers to a thing, which shews the certainty, it need not be particularly alleged: as in debt on bond, if the defendant plead a recovery and execution against another obligor, he need not say by what process or in what county; for this appears by the record. R. Dalis, 33. So, where the certainty of the lands appears, there is no necessity to state them with a *per nomen*, as they are described in the deed. Lutw. 1006. [See 1 Saund. 233. (n. 2.) 2 Saund. 305 a. (n. 13.) ante, p. 132.] Com. Dig. Pleader, E. 9. So, where a defendant in traversing a fact is prevented from also traversing the time, place and other circumstances attending it, lest the traverse should be too large; see ante, p. 193; he may traverse that he did so and so "*in manner and form as the plaintiff in his said declaration has complained against him;*" or that it is so and so "*in manner and form as in the said declaration is stated and alleged.*" See Co. Lit. 281 b. 10 E. 4. 7. 18 E. 4. 21. 21 E. 4. 3. Doct. Pl. 344. 2 Leon. 5.

So where no certainty is at present known, it is sufficient to shew the certainty in evidence, and allege generally in the pleading: as if a man

assume to give a bond with sufficient sureties to save harmless, it is enough to say that he gave a bond with sufficient sureties, without saying in what penalty, &c. ; for until the suit is determined, it is not known how much is sufficient. R. 1 Lev. 267. Com. Dig. Pleader, E. 8. It is also laid down in many books as a rule of pleading, that where a subject comprehends multiplicity of matter, there, in order to prevent prolixity, the law allows of general pleading. Per Buller, 1 T. R. 753. 1 Lutw. 421. 2 Saund. 411. (n. 4.) 1 Saund. 116. (n. 1.) This rule, however, besides being extremely indefinite, seems to me to be too large, and not universally true ; for the Reader will find several cases stated ante, p. 216, which would come within this rule, and yet in which general pleading would not be allowed. But if it be restricted to cases where the certainty is within the knowledge, not of the party pleading, but of his adversary ; or where the charge against the party pleading, and which he is required to answer, has not yet been reduced to certainty by his adversary : I think with these restrictions the rule will be found correct. Thus, in debt on bond, if the defendant set out the condition on oyer, which is for the performance of covenants in an indenture, he may plead performance generally ; ante, p. 217 ; because the plaintiff did not in his declaration charge him directly with the breach of any particular covenant. In debt on bond, the defendant prayed oyer of the condition, which was that the defendant, who was appointed agent of a regiment, should well and duly pay all monies he should receive for the use of the regiment, and faithfully account, and indemnify the plaintiff ; plea, a general performance, and that the plaintiff was not damnified ; replication, that the defendant received from the paymaster-general, for and on account of the said regiment, several sums of money, amounting in the whole to 1400*l.*, but the defendant had not paid them ; on demurrer to the replication, the court held the breach therein to be sufficiently alleged ; 2 Bur. 772 ; because the certainty as to the sums received, must be deemed to be within the knowledge of the defendant, rather *than of the plaintiff. See 1 B. & P. 640. 8 T. R. 459. S. P. If, on the contrary, a bond be conditioned for the performance of several things therein particularly specified, the defendant cannot plead performance generally, for he is apprised with sufficient certainty of the charge which he is called upon to answer ; but he must set forth particularly in his plea how he has performed each particular thing, and lay a time of performance. 1 Sid. 215. 1 Lev. 303. Cro. Jac. 359. 1 Bulst. 43. 1 Show. 1. Ante, p. 216, 217.

Also, it is not requisite to have so much certainty in pleading a matter, which is only conveyance or inducement. Co. Lit. 303 a.

As in trespass, if the defendant justify, that he being possessed for years, the plaintiff would have ousted him, and he in defence of his possession *moliter manus imposuit*; he need not shew by whom, or when, or for how many years he was possessed. R. Cro. Car. 138. In annuity, if the defendant plead that it was granted for holding his courts, and being seised of the manor of D. he requested the plaintiff to hold a court there, who refused; he need not say of what estate he was seised. Cro. El. 419. In trespass, if the defendant justify by a devise, and the plaintiff reply that the deviser died seised, and the estate descended to him as cousin and heir, he need not shew how cousin. R. 2 Cro. 86. If a man make title to an office, he should prescribe for it; but if he allege the office as inducement only; it is sufficient to say *quod est antiquum officium*. R. 10 Co. 59 b. In an avowry, if he allege a partition between A. and B., whereby the *locus in quo*, &c. *inter alia fuit allot* to A., and so justify damage feasant, it is sufficient, without saying what lands in certain were allotted to A., and what to B. R. Plowd. 431 a. Com. Dig. Pleader, E. 10. and see ante, p. 110, 111.

So, much certainty is not requisite in stating negative matter, D. Plowd. 33 b. As in debt on bond conditioned to indemnify, it is sufficient to say *non damnificatus*, without shewing how he was indemnified. [3 Mod. 252. Cro. Jac. 363, 634. 2 Co. 4 a. 1 Lev. 194. 2 Wils. 126. 5 T. R. 309, 310.] In debt on bond conditioned that he will permit ingress and regress, &c., it is sufficient to say *quod permisit*; for it is tantamount to that he did not disturb. R. 1 Leon. 136. Com. Dig. Pleader, E. 11.

What we have hitherto said as to certainty in pleas, must be understood as having reference to pleas which either deny, or confess and avoid, the cause of action. But where the defence is matter of estoppel, the rule is very different; the certainty required in such a case being certainty to a certain intent in every particular; Doct. Pl. in Preface. Co. Lit. 352 b; that is, such a degree of certainty, as to exclude every conclusion or intendment against the party pleading.

Want of sufficient certainty in a plea, may be taken advantage of by special demurrer; but is cured by pleading over or demurring generally. 1 Saund. 116. (n. 1.) Cro. El. 916. Cro. Jac. 165. 363. 634. Cro. Car. 312. 2 Co. 1 b. 4 a. Style, 16. 3 Mod. 252. 1 Lutw. 426, 428. 1 Str. 681. 2 L. Raym. 1416, 1449. 1 Lev. 194. 3 Bing. 61.

It must be positive.] A plea should be direct and positive, and not *by way of rehearsal or argument. Co. Lit. 303 a. March, 207. [See 21 H. 6, 12, Doct. Pl. 40—44]. As in trover for an indenture,

whereby A. granted a manor rendering rent: it is no plea to say that A. did not grant the manor, for it is no answer to the declaration, except by argument. R. Yelv. 223, 224. In ejectment on a lease for ten years, it is no plea that by custom there cannot be a lease for more than six years. R. Dy. 357 b. [If a man be bound by bond to warrant lands, in an action on this bond he cannot plead *pacifice quavisus est*, because it is argumentative merely; he should plead that he did warrant the lands, *et non damnificatus*. Dy. 42 b. 43 a. 2 Co. 3. So, if a *sci. fa.* be brought against a parson for the arrears of an annuity recovered against him, and the defendant plead that before the writ brought he had resigned into the hands of the ordinary, who accepted thereof; this is bad; he should have pleaded that he was not parson the day of the writ brought. 7 E. 4, 16. 2 And. 179, 180. So, in all cases where the plea amounts to the general issue, as already mentioned (ante, p. 177), it is bad, because it is merely argumentative. See Dy. 42 b, 53 a. 22 H. 6, 37. 10 H. 6, 16. 40 E. 3, 15. So, where the plea states an affirmative in answer to an affirmative in the declaration, it is bad, as being merely argumentative: 18 H. 6, 8, 9, 10. Co. Lit. 126; therefore, if a defendant omit a special traverse, when necessary, his plea is bad; the inducement alone being merely argumentative. See 35 H. 6, 33, 34. 34 H. 6, 43. 2 And. 179.] So if a man plead a grant by the king, he should plead directly and positively that the king *concessit*, and not by a *testatum existit quod concessit*; 1 Saund. 274. [and see 1 Sid. 375. Cro. Car. 188. Cro. Jac. 383. 1 Lutw. 537. 2 Lev. 75. Plowd. 143 a. 1 Saund. 274 (n. 1.) 2 Saund. 319. (n. 5); because this is alleging, not that it is so, but merely that the deed says that it is so.] So if the defendant avow and say that A. was possessed, *et sic possessionatus, per indenturam testat' existit*, that he assigned, it is not good. R. 2 Saund. 319. 2 Lev. 12. So, if the defendant plead a lease by a *testatum existit*, it is bad. Cro. El. 195. 2 Cro. 537. [Dy. 118 a. So if the defendant plead *quia obstruxit* &c. it is bad; he should have said *quod obstruxit*. Cro. El. 441. So, if he plead *pro eo quod non monstravit*, &c., it is bad. R. Cro. El. 242. Semb. 1 Saund. 117. Dy. 257 b. But pleading that he entered as son and heir, or justifying as bailiff or servant, is sufficiently positive. 5 H. 7, 2. Dy. 132]. The only mode of taking advantage of an argumentative plea, is by special demurrer; for it is aided by verdict, or on a general demurrer. Alleyn, 48. Com. Dig. Pleader, E. 3. There seems to be one exception, however to this, namely, where a plea is argumentative by reason of a special traverse being omitted; in which case we have seen (ante, p. 195,) the objection is in some cases available upon a general demurrer.

In debt on bail-bond, a plea that no proper affidavit of debt was filed before the issuing of the writ, was holden to be argumentative, and therefore bad on special demurrer. *Hume v. Leversidge*, 3 Tyr. 257.

It seems, however, that all objection upon this account may be obviated by a special conclusion "*et sic*," &c. As in *scire facias* for the arrears of an annuity against a parson, if the defendant plead that he has resigned, it is bad, unless he add *et sic* not parson. Kit. 214 b. 220 b. So, in debt for rent upon a contract, if the defendant plead payment in the same county, it is bad, unless he conclude *et sic nil debet*. Kit. 220. So in debt on bond, if the *defendant formerly pleaded special matter which proved the bond to be void he should conclude *et sic non est factum*. Kit. 220. But if the special matter of the plea be a sufficient bar, it is not necessary to say *et sic*: as, in debt for rent, payment or levy by distress in another county is sufficient, without concluding *et sic nil debet*. Kit. 220. So, if the defendant acknowledge the deed, and plead in avoidance of it, he cannot conclude *et sic non est factum*: as, if he plead duress or infancy, &c. he cannot conclude *et sic non est factum*. Kit. 220 a, b. And generally, where the conclusion (*et sic*) goes to the point of the writ or action, Co. Lit. 303 b., or if the plea conclude *et sic* in the negative. *Id.* Plowd. 15 a. it is a waiver of the special matter of the plea. But if the plea conclude *et sic*, &c. in the affirmative, it is otherwise: Co. Lit. 303 b.: as, if the defendant plead specially, that A. was born between B. and his wife before their marriage, *et sic* a bastard; Plowd. 14 b.; or, in formedon, if the tenant pleaded *ne donna pas*, and the plaintiff replied a recovery in value by reason of a warranty, *et issint dona*. *Id.* 15 a. So, if a defendant plead special matter, and conclude with *et sic* on the general issue, it does not waive the special matter: as, if he plead unlearned, and read in other form, &c., *et sic non est factum*, this conclusion is no waiver of the special matter of the plea. Plowd. 15 a. Com. Dig. Pleader. E. 30. See Yelv. 170. It is very questionable, however, whether, since the late rules on pleading, the conclusion, *et sic*, &c., is now good in any case.

It must not be repugnant.] A plea, in like manner as a declaration, if it be repugnant or insensible, is bad. See ante, p. 112. Thus where in trespass *quare clausum fregit et solum fodit*, the defendant justified that he and his ancestors, &c. had used to have common of turbary to dig and sell, &c. as appurtenant to a house: the plea was holden bad for repugnancy; for a common appertaining to a house, should be spent in the house, and not sold. Noy, 145. So, where a defendant pleaded a grant of a rent out of a term for years, and concluded, by virtue of which he was seised in his demesne as of freehold for the term of his life: the plea was holden bad for repugnancy. 7 Co. 25, and see 11

Co. 96 a. So, if the matter of a plea shew that a bond or other deed mentioned in the declaration is void, or was delivered merely as an escrow, care should be taken not to call it a deed or writing obligatory, lest the plea should be deemed bad for the repugnancy; but it should be named a writing merely, or a "pretended writing obligatory," or the like. See ante, p. 132.

It must be true.] And first, as to the time at which material facts are stated to have happened, the rule is the same as that mentioned ante, p. 113, with respect to declarations; namely, that the dates of written instruments and the dates or other time to which records relate, must be stated truly. Ante, p. 102. In all other cases the defendant is not tied down to the time stated in his plea, if it be stated after a *videlicet*; but he may prove his justification on any other day. 2 Saund. 5. (a. 3.)

Where the matter of the plea is local, and issue is joined upon it, the defendant will be confined in his proof to the county stated, and *to the parish or place if material, in the same manner as a plaintiff is in local actions. See ante, p. 114. 214. But if the matter of the plea be transitory, and the plea have followed the place in the declaration, the defendant will be allowed to prove the matter of his defence at any other place. See ante, p. 214.

Deeds and other contracts must be stated truly in a plea; for if they be put in issue, the slightest variance in substance between the deed or contract given in evidence, and that laid, will be fatal. The rule is the same as stated ante, p. 114, as to declarations. Where a plea alleged that "A. by his writing sold the aftermath of land to B.," it was holden not to be proved by evidence that B. was the purchaser of the aftermath, at an auction held for the purpose of selling it, under a statute enabling A. to sell by writing; that B. gave a promissory note for the sum, and that A.'s agent wrote the name of B. in the printed catalogue as the purchaser. 8 T. R. 151. In replevin the defendant avowed upon a contract for 110*l.* rent, and at the trial proved a demise at 15*s.* per acre, amounting to 111*l.*; and the variance was holden fatal. 4 Taunt. 320. See 6 Bing. 104. So customs and prescriptions must be pleaded truly: as where the defendant pleaded the custom of a manor to be, that the wife of a copyholder should have an estate for life in the copyhold lands after the death of her husband; and the custom given in evidence was, that she should have the estate *durante viduitate*: it was holden a fatal variance. Dy. 192. 4 Co. 30 a. Dect. pl. 200. See 3 B. & Ad. 43. So, evidence that the homage have been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in

~~And~~ upon alienation. 1 B. & P. 393. A party in pleading, however, may prescribe for less than he is entitled to claim; and the variance in that respect between the plea and the evidence will not be material. 1 Taunt. 143.

The greatest care also must be taken in the description of records; for the slightest variance in substance, between the record set out and that produced in evidence, will be fatal in the case of a plea as well as of a declaration. See ante, p. 117. As to the effect of a *scilicet* or *videlicet*, see ante, p. 121. So, in fact, in all other cases, the matter of defence should be stated truly; for if it be put in issue, it must be proved in substance as laid.

In what cases a variance may now be remedied at the trial, see ante, p. 119.

Estate, how pleaded.] Estate is pleaded in the same manner as directed ante, p. 121—126, whether it be a tenancy in fee, fee tail, for life, by the courtesy, in dower, for term of years or from year to year, or at will. If the defendant plead a particular estate, as for instance if he plead an estate for life, the commencement of it should be specially shewn. Co. Lit. 303 b. So, if he plead that A. was seised for life, remainder to B. in tail, remainder to B. in fee, and that A. and B. demised to him, it is insufficient, without shewing the commencement of the estate for life; Dub. 1 Leon. 177. Cro. El. 153, 154; and the same, where he pleads that husband and *wife, seised to them and the heirs of the husband, demised &c. Semb. Cro. El. 112. So, if he plead a confirmation by patron and ordinary, though in such a case he need not shew what estate the patron had, yet if he plead that he had for life, he must shew how the estate commenced. R. Cro. El. 18. So, generally, the commencement of an estate tail should be shewn in a bar, Co. Lit. 303 b., though it is unnecessary to do so in a count. Semb. Cro. Car. 571. W. Jon. 453. [See 4 Mod. 419. Cro. El. 407.] So, if a man plead a term for years, he ought to shew the commencement of the term: as, in an action for land, or for a trespass to land, in which the title of the land may come in question, if the defendant justify under a term for years, it is not sufficient to say *quod possessionatus fuit* of the term, without shewing the commencement of it, Agr. 2 Mod. 70. R. Carth. 444, [even although the original lease be in the hands of the plaintiff. 2 Wils. 65.] So in trespass for taking a horse &c., if the defendant justify under a term, he should shew the commencement of his estate. R. acc. Lutw. 1492. D. Lutw. 1165, for the title may come in question. Per Pollexf. 3 Mod. 132. R. cont. for it is alleged only as inducement to his plea, Cro. Car. 138. 2 Mod. 70. 3 Mod. 132. [and see ante, p. 200.] So, if a man plead a tenancy at will, he should

shew how he has it, whether by demise, as a copyholder, or as tenant at sufferance. Bro. Plead. 85. So, the commencement of a copyhold estate should be shewn; even though it be a copyhold in fee, R. 2 Cro. 103. Cro. Car. 190. R. 4 Mod. 346, or though it be in justification for taking damage feasant; R. 4 Mod. 346. [but see ante, p. 201;] but it is sufficient to shew the copy of the last admission; R. 2 Cro. 103; and the omission is only form, and aided on a general demurrer. R. Cro. Car. 190. Cont. 2 Cro. 103. But the commencement of the estate need not be shewn, where it is alleged merely as inducement: as, in trespass *quare clausum fregit*, if the defendant plead that he was possessed for years of the adjoining close, and that his cattle escaped through defect of the fences which the plaintiff was bound to repair, it is good, without shewing the commencement of the estate; for the interest in the land cannot come in question. R. Yelv. 74. Co. Lit. 303. [Ante, p. 201, and see Cro. El. 112.] So if a man shew a grant, by copy, of a reversion after the death of A., he need not shew the grant to A., for it is only conveyance. R. 2 Cro. 52. Com. Dig. Pleader, E. 19. So, the commencement of estates in fee need not be shewn. Co. Lit. 303 b. Cro. Car. 571. So a man may plead seisin of a reversion in fee after an estate for life, without shewing the commencement of the estate. 1 Saund. 250. 260. So the king, seised *in jure coronæ*, need not shew how the estate came to him, if he shew that his ancestor was seised in fee; for it shall be intended to have continuance. R. Bridgm. 8. and see Carth. 115. Com. Dig. Pleader, E. 20. As to the continuance of particular estates, in what cases it is necessary to be shewn, see ante, p. 123, 124.

So, if the defendant allege that he was seised, he must say of what estate. R. Lutw. 1816. 1232. Carth. 9. Semb. 5 Mod. 72, 150. So, if persons who constitute a body politic, be named by their proper names, it is not sufficient to say they are seised, *without saying in right of the corporation. Plowd. 103 a. So, persons seised to the use of a hospital, ought to plead seisin *in jure hospital'*. But persons incorporated to the use of a hospital, should plead seisin *jure incorpor' suæ*; for *jure hospital'* would be bad. R. 10 Co. 34 a. So, a sole corporation should always plead seisin in his corporate right; R. 2 Lev. 68. Plowd. 103 a.; and the omission will be bad on a general demurrer. Per Powel, Lutw. 1332. But an abbot or prior and convent, need not say in what right they are seised: for being persons dead in law, they can be seised only in right of their house. Plowd. 102 b. Dub. 1 Show. 63. So, a corporation named by their corporate name, need not say *quo jure* they are seised; for it cannot be otherwise intended: as if a mayor and commonalty plead seisin, it is sufficient, without say-

ing *jure corporat*. 1 Leon. 153. If a master of a college and his fellows plead seisin, it is sufficient, without saying *jure collegii*. R. Plowd. 102 b. R. Cro. El. 232. So, if by the whole plea the matter of the seisin appear, it is sufficient: and therefore if it be alleged that a woman had a term for years and took husband, by reason whereof the husband and wife were possessed, it is sufficient, without saying in *jure uxoris*. R. Plowd. 191 a. Com. Dig. Pleader, E. 22. See ante, p. 125. In stating the seisin of the king, it is necessary to say in what right he is seised, whether in right of his crown of England, or of his duchy of Lancaster, &c. It must also be shewn of what estate he is seised &c.; for he may have a less estate than a fee-simple. 1 Saund. 167. (n. 1.) Latch. 14. 121. Ante, p. 125.

Estates in remainder and reversion, are pleaded in the same manner as in a declaration; see ante, p. 125; so are estates in joint-tenancy, coparcenary, and in common. See ante, p. 125. 22 H. 6, 12. 3 H. 6, 56. Doct. Pl. 63, 250. Also, if the defendant allege a title in the plaintiff, it is sufficient to state it in general terms, in the same manner as a plaintiff states a defendant's title in a declaration. See ante, p. 125.

Title how pleaded.] It has been already observed, that if the matter of defence arise from title in the defendant, whether it be title by descent, or by alienation by deed or matter of record &c., the title must be fully set forth in the plea; the defendant cannot in such a case rely merely upon his possession, as a plaintiff may in some cases in his declaration. Ante, p. 200. 2 Cro. 52. Yelv. 74. 1 Ro. Rep. 18. So formerly, where the matter of defence arose from a title by prescription or custom, the title must have been fully set out in the plea. As in trespass *quare clausum fregit*, where the defendant justified the trespass by reason of some title or easement, which gave him a legal right to do the act which was the subject of the action, he must have set forth his title, or right to enjoy the easement, specially, in order that the plaintiff might have an opportunity of traversing it; and the same rule prevailed in replevin. 2 Saund. 402. (n. 1.) So in a plea justifying under a right of common, the defendant must have set out his title to the common specially, by shewing a seisin, in fee either in himself or some other under whom he derived title, and then prescribing in a *que estate* for the right of common. 4 T. R. 718, 719. Cro. Car. *549. So in case, for not repairing a private road leading through the defendant's close, it was and still is sufficient for the plaintiff to allege generally that the defendant, as occupier of the close, is bound to repair; but where a defendant prescribed for a right of way or other easement in right of his own estate, he must have set forth specially the estate, in right of which

he claimed the privilege. 3 T. R. 776. But now, by stat. 2 & 3 W. 4, c. 71, s. 5, "In all pleadings to actions of trespass, and in all other pleadings, wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act," (see ante, p. 25). "as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." See ante, 25, 26.

Where the defendant's title or right, however, is matter of inducement or conveyance merely, it is, and was always, sufficient for him to allege that he was possessed &c., and state his title generally, as in a declaration: as, where the justification is, an escape of cattle from a common to a close in which &c., through the defect of a fence which the plaintiff was bound to repair, or an escape from the defendant's own close; here the defendant's title, being mere inducement to the matter of defence, may be stated generally as in a declaration. Yelv. 75. 1 Saund. 346. (n. 2.) So, in trespass for an assault, if the defendant say that he was possessed of a house for years, and the plaintiff disturbed him, for which reason *molliter manus imposuit* &c.; it is sufficient without shewing by what title he was possessed: R. Cro. Car. 138. 4 Mod. 420. 'Though if the defendant in such a case will set forth his estate specially, he thereby gives the plaintiff an opportunity of traversing it. Dy. 365. F. N. B. 298. (n. 2.)

So, in trespass for taking cattle or goods, if the defendant justify damage feasant, he need not set forth his title specially; but it is sufficient for him to say that he was possessed of a close, and so justify. 2 Saund. 346 d. 2 Salk. 643. 3 Mod. 132. 2 Mod. 70, and see Com. Dig. Pleader, C. 41. E. 19, and ante, p. 201.

Title by descent is pleaded in the manner mentioned ante, p. 126.

Title by prescription is pleaded also in the manner, and under the same circumstances, as mentioned ante, p. 126. See also supra. So a title by common is pleaded as directed, ante, p. 129. See 3 B. & Ad. 43. See also supra. One prescription or custom may be pleaded in answer to another, without a traverse, where the latter is not inconsistent with,

but is merely a qualification of the former ; 2 Wils. 101. cit. Godb. 183. 2 Mod. 104 ; and even although the latter be inconsistent with the former, yet it may be pleaded, but with a traverse. See Bac. Abr. Customs, H. But if a man *prescribe for a way, over the land of B., to his freehold, B. cannot prescribe to stop it. 9 Co. 59.

Title by *alienation* is also pleaded as directed ante, p. 131. As to pleading a deed, generally, see ante, p. 132, 133 ; and as to profert of deeds, (which is as necessary in a plea and other pleadings as in a declaration), see ante, p. 133—137. But if a man plead a deed by way of discharge, and not in order to make a title, he need not plead it with a profert : as, in bar to an avowry made by a corporation for rent and services, if the plaintiff plead a lease of the manor made to A., who demised to him, he need not shew the deed ; for it is pleaded by way of discharge merely, and not for the purpose of claiming title by it. R. Moor, 870. So, if there be a grant to the lord of a manor that the tenants of a manor shall be discharged of toll, and a tenant plead such discharge, he need not shew the grant. 20 H. 7, 6 b. cont. per Brudnel, 20 H. 7, 7 a. Com. Dig. Pleader, O. 16.

As to the manner of pleading a feoffment, see ante, p. 138 ;—of pleading a lease, ante, p. 138 ;—of pleading a surrender, ante, p. 139 ;—of pleading an assignment, ante, p. 139 ;—of pleading a covenant to stand seised to uses, ante, p. 140 ;—of pleading a bargain and sale, ante, p. 140.—of pleading a lease and release, ante, p. 140 ;—of pleading letters-patent or grants for the crown, ante, p. 141 ;—of pleading a fine, ante, p. 142 ;—of pleading a common recovery, ante, p. 143 ;—of pleading a surrender of and admission to copyhold lands, ante, p. 143 ;—of pleading a devise or will, ante, p. 144 ;—of pleading an act done in pursuance of a power, ante, p. 144 ;—of stating the effect of a conveyance, ante, p. 144.

Statutes and other Records, how pleaded.] As to pleading public statutes, and the manner of stating the matter of a defence so as to bring it within a public statute, see ante, p. 144 ;—and as to the manner of pleading private statutes, see ante, p. 146. As to the manner of pleading judgments, see ante, p. 148 ; of pleading recognizances, &c., ante, p. 148 ; of pleading writs, ante, p. 149. If the defendant justify by process out of an inferior court, he must shew in what action &c., in order that it may appear that the inferior court had jurisdiction. Per 2 J., March, 118. see 5 Taunt 69. So in debt upon a lease of a vicarage, if the defendant plead a sequestration, he should shew before whom, for what cause, and legal process. Hob. 296. So, if the defendant were authorized by a warrant or other authority to do what he is charged with in the declaration, he should regularly shew the warrant &c.

specially. Co. l.it. 283 a. As, in trespass, if the defendant justify as bailiff to the sheriff, it is not sufficient to say generally that he acted by virtue of a certain warrant directed to him, but he must set it forth specially. R. 3 Mod. 138. 1 Salk. 107, 108. 4 Mod. 378. So, in trespass, it is not sufficient to say that he took &c. *tanquam ballivus manerii per mandat' domini*; but he should shew a precept directed to him. R. 4 Mod. 378. He should also shew the substance and effect of his authority to have been specially pursued. Co. Lit. 308 b. Com. Dig. Pleader, E. 17. 1 Saund. 298. (n. 1.)

**Averments.*] As to averments, how made, and in what cases necessary, see ante, p. 149.

Protestation to part.] We have seen (ante, p. 203.) that a man, by not denying a matter alleged upon record, may afterwards be estopped from controverting the fact as there alleged. There are some cases, however, in which he cannot, according to the rules of pleading, traverse such fact. And formerly, in such cases, making protestation as to the facts not answered by his plea, was, as far as regards the estoppel, equivalent to a traverse; the defendant thereby avoided the estoppel, and he might afterwards in a subsequent action traverse those facts he had protested, if it became necessary for him to do so. But now, by Reg. Pl. H. 4 W. 4, l. s. 12, "no protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made."

SECT. III.

Conclusion of the Plea.

The conclusion of a plea in bar, is either to the country, or with a verification. The form of a conclusion to the country is thus: "and of this he the said defendant puts himself upon the country, &c." The form of a conclusion with a verification, is thus: "and this he the said J. S. is ready to verify." Formerly, this conclusion with a verification included also a prayer of judgment if the plaintiff should have or maintain his action; but now, by Reg. Pl. H. 4 W. 4, l. s. 9, this is no longer necessary in pleas which are pleaded in bar of the whole action generally.

We shall now proceed to consider, under the following heads, in what cases the conclusion to the country is requisite, in what cases the conclusion with a verification.

General Traverse.] The general issue in all cases concludes to the country. So, a general traverse of part of a count, must conclude to the country. So, generally, in all cases where there is an affirmative

on the one side and a negative on the other, or *vice versa*, the conclusion must be to the country. 1 Saund. 103. (n. 1.) T. Raym. 98. Carth. 87. 2 Saund. 189. 2 Bur. 1022. Therefore, in assumpsit, if the plaintiff declare upon a submission to an award, that such an award was made, and that the defendant had not performed it; if the defendant plead *no such award*, he should conclude to the country. R. 2 Saund. 337. So, if the plaintiff allege that the award was tendered to the parties, &c., and the defendant answer that it was not tendered *modo et forma*, he should conclude to the country. R. 2 Saund. 190. Lutw. 528. So, if the plaintiff in an *audita querela* allege tender at the day, and no one ready to receive, and the defendant plead that he was ready, he should conclude to the country. R. 2 Cro. 14. So in trover for selling a gold chain, and converting the money to his own use; if the defendant plead *non vendidit*, he should conclude to the country. R. 1 And. 20. And the same in assumpsit for not paying money on a certain day, if the defendant plead *solvit ad diem*; R. 2 Salk. 516; or in covenant, if the plaintiff assign for breach *quod non solvit* &c. and the defendant plead *quod solvit*. R. Carth. 88. So, in all cases where the defendant pleads a fact merely in the negative, he should conclude to the country, for a negative cannot be averred. [Co. Lit. 503 a. Doct. Pl. 50.] So in such a case he should conclude to the country, although matter of record be mentioned in the plea: as if it be alleged that the defendant procured letters-patent, and he say that he did not procure them, he should conclude to the country; for the procurement is the principal matter. R. 3 Mod. 79. So, if a defendant plead a special negative to the affirmative in the declaration, he should conclude to the country: as in debt on bond, if he plead a special *non est factum*, such as a delivery as an escow, he should conclude to the country. R. 1 Salk. 274. Com. Dig. Pleader, E. 32. If, however, the plea, in any of these cases, conclude with a verification, &c., instead of concluding to the country, it is merely a defect in form, and can be taken advantage of by special demurrer only. 4 And. c. 16. 2 Saund. 190. (n. 5.)

Special Traverses.] Formerly a plea containing a special traverse must have concluded with a verification. Co. Lit. 126 a. 2 Saund. 189. 2 Str. 871. 1 Salk. 4. R. 3 Mod. 203. Fitzg. 130. But now by Reg. Pl. H. 4 W. 4, L. s. 13, "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial." See ante, p. 193. Formerly, the opposite party might traverse the inducement, not only in cases where the traverse was immaterial, but

also where the traverse was of the time or place stated in the declaration, &c. Cro. Car. 105. Co. Lit. 182 b. Hob. 104. Moor, 428, 350, 1 L. Raym. 121, and see Com. Dig. Pleader, G. 18. But as the above proviso allows a party to plead to the inducement only in cases where the traverse is immaterial, the opposite party cannot now do so in cases where the traverse is of the time or place in the preceding pleading; for as the special traverse now always concludes to the country, in all cases not within the above proviso, he must join issue upon it, by adding the similiter; he is precluded by the conclusion to the country from doing otherwise.

Title and Colour.] Where the defendant pleads his title and gives colour to the plaintiff, (see ante, p. 195,) he must conclude with a verification. If he conclude to the country, however, the plaintiff can take advantage of the mistake by special demurrer only. 4 Ann, c. 16. 2 Saund. 190. (n. 5.)

Confession and Avoidance.] If the plea confess and avoid the matter of the declaration, (see ante, p. 199,) it must conclude with a verification; it being an established rule in pleas, replications, &c., that whenever new matter is introduced, the pleading must conclude with a verification, in order to give the other party an opportunity of answering it. 1 Saund. 103. (n. 1.) Carth. 337. 1 Lutw. 101. 2 Wils. 66. 2 T. R. 576. Doug. 60, and the authorities there cited. Doct. Pl. 50. 284. 8 H. 6. 28. As if in assumpsit the defendant plead infancy, he must conclude with a verification. Fortesc. 334. So, if the plaintiff say that the defendant received 20*l.* for which he did not account; and the defendant plead that he was robbed of it, and gave notice thereof to the plaintiff; the plea must conclude with a verification. R. 2 Lev. 5. So the special plea of bankruptcy must conclude with a verification; but the general plea of bankruptcy, which is usually pleaded where the certificate has been obtained before the commencement of the action, should conclude to the country. Fortesc. 334. Barnes, 330. An avowry, also, does not conclude with a verification, for it is in the nature of a count. Co. Lit. 303 a. R. Plowd. 342 a. 163 a. If a plea of confession and avoidance do not conclude with a verification, the omission or defect can be taken advantage of by special demurrer only. 4 Ann. c. 16. See Lutw. 21. 16. 1 Vent. 240. Skin. 340. Com. Dig. Pleader, E. 33.

Matter of Record.] When matter of record is pleaded, the plea should conclude with a verification by the record, thus: "*and this be the said J. S. is ready to verify by the said record.*" As to the *probat per recordum*, and in what cases necessary, see ante, p. 137. 149. In pleading a writ, however, it is not necessary to conclude with a veri-

lication by the record, Fortesc. 334, even in the case of a writ with continuances. So, if the plea contain matter of fact as well as matter of record, it should not conclude with a verification by the record, but with a verification, or to the country, as in ordinary cases: as if it be alleged that the plaintiff procured letters-patent, and the other party say that he did not procure them, he should conclude to the country; for the procurement, which is a matter of fact, is the principal matter. R. 3 Mod. 79. The plea of *nul tiel record*, also, must not conclude with a verification by the record, but with a verification merely; see Fortesc. 339; *nul tiel record* to debt on an Irish judgment, concludes to the country. 5 East, 473.

No advantage shall be taken for want of "*hoc paratus est verificare per recordum*;" or "*or prout patet per recordum*," unless specially shewn for cause of demurrer. 4 Ann, c. 16, s. 1, and see 5 Mod. 8, 9. Per Holt.

Matter of Estoppel.] As to the conclusion of a plea of matter of estoppel, see ante, p. 212.

*SECT. IV.

Sham Pleas.

Sham pleas are frequently pleaded by attornies, in order to delay the plaintiff, and gain time for the defendant.

This is no doubt an abuse of pleading, and the court accordingly look upon it with great jealousy. Where a sham plea was pleaded of judgments recovered in the court of Pie Poudre in Bartholomew fair, in terms palpably fictitious and out of the regular course, the court reprobated the practice, and suffered the plaintiff to sign judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, together with the costs of the rule &c. 10 East, 237. So where the defendant pleaded a sham plea of judgment recovered to one of the counts in the declaration, and a sham plea of payment to the other counts, the court upon application allowed the plaintiff to sign judgment as for want of a plea, and ordered the defendant or his attorney to pay the costs of the plea and of the application, on an affidavit that both pleas were false; because these pleas would have raised issues requiring different modes of trial, and thereby imposed an improper difficulty upon the plaintiff. 2 Barn. & Ald. 197. 777. So where a sham plea stated that the defendant gave the plaintiff a bill of exchange for part of the debt, and assigned to him an Irish judgment for the residue; the plea being ingeniously drawn, and such as would put

the plaintiff to the necessity of consulting counsel, and thereby occasion delay and expense, the court upon application allowed the plaintiff to sign judgment for want of a plea, and ordered the defendant's attorney to pay the costs of the application. 2 Barn. & Ald. 199. And see 1 Taunt. 225. So, when the defendant, after obtaining an order to stay proceedings upon payment of debt and costs, and having abandoned that order, filed a sham plea of judgment recovered, which the plaintiff treated as a nullity and signed judgment: the court refused to set aside the judgment, as the plea appeared evidently to be false, from the circumstance of the defendant's having obtained the order above mentioned. MS. H. 1820. So, where to debt on judgment the defendant pleaded a release, which he alleged had been destroyed by accident, the Court of Common Pleas, upon an affidavit that the plea was wholly false, allowed the plaintiff to sign judgment as for want of a plea. 8 Bing. 435. And the Court of Exchequer have, upon application, set aside a plea, under similar circumstances. 1 Dowl. 648. But it is not by any means a matter of course, for the courts to interfere thus summarily in such cases, upon a mere affidavit of the falsehood of the plea, which would in effect be trying the issue between the parties upon affidavit; see 2 B. & C. 81. 1 Bing. 380. 4 Id. 512. 2 Crompt. & J. 85; it is only where the plea appears to be palpably fictitious, or out of the usual course, that they will do so. See 1 Arch. Pr. C. B. 111. Formerly, the plea of a judgment recovered in another court for the same cause of action, was the common and ordinary sham plea, *adopted in most cases. But this is now virtually abolished by Reg. Pl. H. 4 W. 4, l. 8, by which it is ordered, that "where a defendant shall plead a plea of judgment recovered in another court, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge.

SECT. V.

Several Pleas.

At Common Law.] The defendant, at common law, may plead several pleas, provided each goes to a different and distinct part of the declaration. Co. Lit. 304 a. [33 H. 6, 51, 52. Doct. Pl. 142. 146.] As in dower, the tenant may plead joint-tenancy to part, and detain of charters as to the residue; Kit. 223 b: or, in assise, a fine as to a moiety, and a release of the father with warranty as to the other moiety. Id. In trespass for an assault, battery and wounding, the defendant may plead not guilty to the wounding, and justify the assault and battery. Mar. pl. 106. So, in trespass for breaking his house, &c., the defendant may plead as to all the trespass *præter* three posts, not guilty; and as to the breaking the three posts, he may justify. R. Cro. El. 87. Com. Dig. Pleader, E. 2. see 37 H. 6. 38. 18 E. 4. 11 b. So, if a man give me all his trees, and he cut them down, and I carry them away; to trespass for cutting down and carrying them away, I may plead not guilty as to cutting them down, and justify as to taking them away. Dy. 305 a. 33 H. 6. 12 b, per Prisot.

A defendant, however, will not be allowed to plead in abatement and in bar to different parts of the same declaration. 11 Co. 52 a. D. 1 Sid. 176. Nor can he plead a tender to one count, and alien enemy to another; 10 East, 326; for the latter, if true, is a sufficient answer to the whole declaration. So in a *præcipe quod reddat*, if the defendant pleaded bastardy as to one acre, and joint-tenancy as to the other, it was bad; for the bastardy was an answer to the whole. 32 H. 6, 33 b. 7 H. 6, 14. Nor can a defendant plead *nil debet* to part, and *nil habet in tenementis* to another part; for *nil debet* admits the demise. R. 4 Mod. 254. R. 1 Salk. 218.

Nor could he at common law plead several pleas to the same part of the declaration. Therefore he could not plead not guilty to part, and justify for the same part. R. 1 Rol. 49. and see Co. Lit. 303 a. 304 a. Hob. 295. So, to debt on several bonds, he could not plead a release of all actions, and that one of the bonds was obtained by duress of imprisonment. Per cur. 21 H. 6, 18. and see 3 H. 6, 16, *19. The plea in these cases is bad for duplicity; and advantage may be taken of it by special demurrer. Ante, p. 174, 176.

By Statute, &c.] We have seen that at common law a defendant could not plead two or more pleas to the same part of the declaration. But by stat. 4 Ann. c. 16, any defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, may, with leave of

the same court, plead as many several matters thereto, as he shall think necessary for his defence. The pleas must be pleaded at one and the same time; Fortesc. 336. Barnes, 338; and the defendant is not restricted in the number of them. Fortesc. 337. He cannot, however, plead and demur to the same part of the declaration; 8 Mod. 261. 327; nor plead in bar and in abatement; Hardw. 135; nor does the statute extend to allow of two or more rejoinders to the same part of the replication, or the like. 2 Str. 908. Bac. Abr. Pleas, K. 3. Barnes, 364.

Where a defendant is allowed by a statute to give special matter in evidence under the general issue, he cannot plead the general issue and also a special plea of justification. *Neal v. Mackenzie*, 4 Tyr. 670.

First, as to several pleas embodying the same answer or defence: By Reg. Pl. H. 4 W. 4, I. s. 5, several pleas or avowries, or cognizances shall not be allowed, "unless a distinct ground of answer or defence is intended to be established in respect of each." As for example, "Pleas, avowries and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule), are not to be allowed. Pleas of *solvit ad diem* and *solvit post diem*, are both pleas of payment, varied in the circumstances of time only, and are not to be allowed. But pleas of payment, and of accord and satisfaction, or of a release, are distinct, and are to be allowed. Pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed. But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time in consideration of the same security, are not distinct, for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed. In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed. But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed. So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed. Avowries for distress for rent, and for distress for damage feasant, are to be allowed; but avowries for distress for rent, varying the amount of the rent reserved, or the times at which the rent

is payable, are not to be allowed. The examples in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified." From this rule it follows of course, that a defendant cannot *plead specially any matter of defence which can be given in evidence under the general issue, (see ante, p. 178 &c.) and also plead the general issue.

By the same rule, s. 6, where more than one plea, avowry or cognizance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the pleas, avowries or recognizances are founded on the same ground of answer or defence, for an order that all the pleas, avowries or cognizances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied upon cause shewn, that some distinct ground of answer or defence is intended to be established in respect of each of such pleas, avowries or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied, and shall also specify the pleas, avowries or cognizances mentioned in such application, which shall be allowed.

And by the same rule, s. 7, where there is more than one plea, avowry or cognizance upon the record, and the party pleading fails to establish a distinct ground of answer or defence in respect of such plea, avowry or cognizance, a verdict and judgment shall pass against him upon each plea, avowry or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such plea, avowry or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any plea, avowry or recognizance allowed as aforesaid, upon the ground that some distinct ground of answer or defence was *bona fide* intended to be established in respect of such plea, avowry or recognizance so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct ground of answer or defence was *bona fide* intended to be established in respect of such plea, avowry or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any plea, avowry or cognizance, with respect to which the judge shall so certify.

Secondly, as to several pleas, each stating a distinct ground of answer or defence: the defendant, besides the general issue, will in

general be allowed to plead specially such other distinct answers or defences as cannot be given in evidence under the general issue. In *assumpsit*, indeed, he will not be allowed to plead *non assumpsit* to the whole, and a tender as to part; 4 T. R. 194. 3 Wils. 145. and see 5 T. R. 97. 2 Str. 949; but he may plead *non assumpsit* and the statute of limitations; Id. 329. Str. 678. 889. and see Barnes, 331. Fortesc. 337; *non assumpsit*, the statute of limitations, and set-off; Barnes, 286; *non assumpsit* and a set-off; Id. 360. 366. and see Id. 838; *non assumpsit*, and judgment recovered; Fortesc. 337; but see 2 B. & A. 777; *non assumpsit*, and that defendant was discharged under an insolvent act; Barnes, 343; *non assumpsit* and bankruptcy; 2 Str. 1000. See Fortesc. 336; *non assumpsit* and *plene administravit*; Barnes, 348. 368. and see Id. *332. Bunb. 182; *non assumpsit*, and *ne unques executor*; Fortesc. 336; *non assumpsit* by testator, statute of limitations, *non assumpsit* by executor, and *plene administravit*. Hardw. 248.

In debt, also, the defendant cannot plead *non est factum* to the whole declaration, and a tender as to part. 5 T. R. 97. 4 Taunt. 459. The Court of Common Pleas have also refused to allow *non est factum* and *solvit post diem*; Barnes, 363. 2 W. Bl. 905; *non est factum* and *solvit ad diem*; 2 W. Bl. 993, and see 13 East, 255; and *non est factum*, and other pleas which necessarily import the execution of the deed. 3 Taunt. 385; so, *non est factum* and coverture, the latter being in abatement, the former in bar. Hardw. 135. But the defendant may plead *non est factum* and usury; 2 B. & P. 12; *non est factum* and bankruptcy; 2 Str. 871. 1000; *non est factum*, and that the defendant was discharged under an insolvent act; Barnes, 343; *non est factum* and infancy; Id. 363; *non est factum* and duress; Id. 359; *non est factum* and *ne unques executor*; Id. 352; *non est factum*, and conditions performed, Bunb. 96. So in debt on articles of agreement relating to South Sea Stock, the defendant, had leave to plead *non est factum*, *non obtulit*, *non dedit notitiam secundum* the proviso in the deed, and that the deed was not registered. Bac. Abr. Pleas, K. 3. So, in debt on bond conditioned to marry the plaintiff upon request, the defendant had leave to plead *non est factum*, and that she had never been requested. 2 Str. 908. See 1 New Rep. 121. 1 B. & P. 447. But in an action in the King's Bench, on a bond given in the East Indies, where the subscribing witness resided, the defendant having (after many delays already caused by him) pleaded *non est factum*, *solvit ad diem* and *solvit post diem*, under a rule to plead several matters; as it appeared that this was done merely for the purpose of delay, and that a part payment of the debt had been made recently before the commencement of the action, the court upon application discharged the rule to plead several

matters, in order to make the defendant elect to stand either on the plea of *non est factum*, or on the other pleas. 13 East, 255.

To debt for work and labour, and for money paid to the use of the defendant; the court allowed the defendant to plead the general issue, and also that the work was done, and money paid by the plaintiff in carrying into effect illegal wagers as to the price of tallow. *Triebnerr v. Duerr*, 1 Bing. N. C. 266.

In trespass, the defendant may plead not guilty, and *son assault demeune*; Bac. Abr. Pleas, K. 3. Barnes, 351, 352; not guilty and a licence; Barnes, 364, see Id. 349. 351; not guilty, and *molliter manus imposuit*; Barnes, 352; not guilty, *son assault demeune*, and *molliter manus imposuit*. Id. 355; not guilty, and a justification; Id. 355, 356. See Id. 330. Fortesc. 385; not guilty, and a sum paid in satisfaction of all trespasses; Id. 349; not guilty, and tender of amends. Id. 366. see Id. 359. But to an action for assault and false imprisonment, the Court of King's Bench have refused to allow the defendant to plead alien enemy, together with a special justification inconsistent therewith, and also the general issue. 13 East, 206.

In case against the postmaster-general, he was allowed to plead not guilty, and the statute of limitations. 2 Str. 669. Fitzg. 189. Barnard, 407. So, in case for words, not guilty and a justification have been allowed. Barnes, 356. In trover, the defendant has been allowed to plead not guilty, and a general release; Id. 347; *but the Common Pleas have refused to allow of not guilty, and an accord and satisfaction, Id. 329; and not guilty and the bankruptcy of the plaintiff. Id. 360.

In replevin, the defendant has been allowed to plead, property in another, and a justification as a distress for rent; Barnes, 339; distress damage feasant, and for rent in arrear; Id. 340; *non cepit*, property in another, and *liberum tenementum*. Id. 364, 365. and see Id. 361.

In *quare impedit*, the patron has been allowed to plead that he was seised in fee of the advowson, and that he had the next presentation; Fortesc. 337; but in a case where the king was a party, the rule to plead double was refused. Barnes, 353. Willis, 539. In *scire facias* on a judgment, the terretenant was allowed to plead payment of the money recovered, and that the defendant in the original action was not seised. Hardw. 153.

An executor will be allowed to plead *plene administravit* and a set-off; Barnes, 347; *solvit ad diem* or payment, and *plene administravit*; Hardw. 178. Bunb. 181; *ne unguis executor*, and *plene administravit*. Barnes, 349. 355. 365. A bankrupt will be allowed to plead his bankruptcy, generally and specially. 2 Str. 1090. In debt for rent, the defendant

has been allowed to plead *nil habuit in tenementis* and *non demisit*; Bac. Abr. Pleas, K. 3; so, a tender and eviction; Id. 1 Str. 496; so, non-tenure, nothing in arrear, and infancy; 5 Taunt. 340. 1 Marsh. 74; so, in debt against an heir, *solvit ad diem*, and *riens per discent*. See Barnes, 332. In trespass, the defendant has been allowed to plead a licence, and a justification of cutting down some boughs, because they hung over his garden; Bac. Abr. Pleas, K. 3; so, that he cut down a tree for repairs, and because it interrupted his water-course. 1 Str. 425. But the defendant will not be allowed to plead two justifications under distinct titles; Fortesc. 380; and leave to plead *liberum tenementum*, and a justification of pulling down a weir as a nuisance, has been refused; Barnes, 329; so, leave to plead tender of amends, and a justification that the plaintiff's fences were out of repair, has been refused. Fortesc. 386.

The statute 4 Ann. c. 16. above mentioned, does not extend to penal actions; 4 Ann. c. 16, s. 5. 4 T. R. 701. Hardw. 262, 2 Str. 1044. 2 Wils. 21. Barnes, 365; nor to suits where the king is a party. Wills. 533, unless for a debt immediately owing to him, or in matters of revenue. Barnes, 353. So the statute does not extend to allow two or more pleas, which require different trials: thus, in dower, the tenant cannot plead *ne unques accouple* and a mortgage; for the first should be tried by the bishop, the second by a jury. Comyn's R. 148. So, *ne unques accouple*, and *ne unques seisis que dower*, cannot be pleaded, for the same reason; 2 W. Bl. 1157. 1207. See 2 Wils. 119; nor a judgment recovered, and accord and satisfaction. Semb. 2 Barn. & Ald. 777.

Formerly, the courts were in the habit of refusing a rule to plead several matters, where the pleas were inconsistent with each other. But this rule has in modern practice been much relaxed, and the courts will at present in general allow the defendant to shape his *defence in any manner he may think most conducive to his interest, by means of several pleas, containing distinct answers or defences, provided the pleas be not such as to put the plaintiff to unnecessary difficulties in proving issues foreign to the merits of the matter in question; for although the court are bound to grant the benefit of this statute to persons applying for it, yet they will take care that, in doing so, the statute is not abused, by multiplying fruitless and impertinent issues. See Bac. Abr. Pleas, K. 3. 4 Bing. 525. If the pleas, in deed, be inconsistent, the Court of Common Pleas will require an affidavit of their necessity, before they will allow them. 3 Bing. 635.

Before you plead several pleas, &c. a rule must first be drawn up, to enable you to do so. And by Reg. Gen. H. 2 W. 4, s. 34, "if a party
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plead several pleas, avowries or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment." But by Reg. Gen. T. 1 W. 4, s. 12, "no rule to shew cause or motion shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries or cognizances: provided that no summons or order shall be necessary in the following cases; that is to say, when the plea of *non assumpsit*, or *nil debet* or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy or coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases a rule shall be drawn up by the proper officer upon the production of the ingrossment of the pleas, or a draft or copy thereof."

The form of pleading a second plea, under this statute, is thus: "*And for a further plea in this behalf, the said defendant says that*" [&c. stating the matter of defence.] Formerly the plea always stated that it was pleaded with the leave of the court; and omitting to do so, has been holden bad upon special demurrer. Andr. 106, but see 1 Wils. 219. But now, by Reg. Pl. H. 4 W. 4, l. s. 11, "it shall not be necessary to state in a second, or other plea or avowry, that it is pleaded by leave of the court, or according to the form of the statute, or to that effect."

SECT. VI.

Pleas by several Defendants.

If there be several defendants, they may either join in their pleas, or each may plead separately. 2 Salk. 456. Co. Lit. 303 a. If they sever, the plaintiff may reply to or join issue upon one plea, and demur to another; Cro. Car. 243; or he may in most cases enter a *nolle prosequi* as to one defendant, and proceed against the other. As to the cases in which he may enter a *nolle prosequi*, see 2 Arch. Pr. C. P. [56] 256. In actions where the plea of one defendant enures to the benefit of all, as in actions upon *contracts, 1 Lev. 63. 1 Sid. 76. Ca. Pr. C. B. 107. Pr. Reg. 102. 3 T. R. 662, if the plaintiff fail of obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for the con-

tract being entire, the plaintiff must succeed against all the defendants or none. In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to go by default, 2 Str. 1108. 1222; unless the plea of those who pleaded, prove that the plaintiff could have no cause of action against any of them; 2 L. Raym. 1372. 1 Str. 610. 3 Mod. 217; for the tort is several, as well as joint.

If the defendants join in their plea, and it be in the singular number, it is bad. H. Lutw. 1581, even on a general demurrer. Somb. Id. Also, it is a general rule, that if two or more join in a defence, which is a sufficient justification for one, but no justification for the others, the plea is bad as to all; for the court cannot sever it, and say that one is guilty and the other not, when they all put themselves upon the same terms. 1 Saund. 28. (n. 2.) 1 Str. 509. 904. 1184. 3 T. R. 376, 377. Per Buller.

SECT. VII.

Defects in Pleas, in what Cases aided.

By the Replication, &c.] A bad plea in bar may be aided by the replication: as, if the defendant in assise pleaded a feoffment upon condition, and entry for the condition broken, without shewing the deed, as he ought; if the plaintiff replied that after the feoffment and entry the defendant re-enscuffed him, this confession in the replication aided the defect in the bar; Plowd. 230 b.; and the same, if the plaintiff had replied that before entry the defendant released to him. Id. So, in debt on bond conditioned to make an estate to A., if the defendant plead that he enscuffed another to the use of A., which is not good without shewing that A. was a party or had the deed &c., yet if the plaintiff reply that he did not enscuff, this aids the bar. H. Cro. El. 825. So, if the defendant plead an award &c., without sufficient certainty and the plaintiff make a replication which imports the award &c. to have been made, it aids the uncertainty of the bar; see Kit. 238; and the like, if the defendant plead a judgment without saying *prout patet per recordum*, and the plaintiff reply that the judgment is fraudulent. R. & Lev. 311. So, if the plaintiff by his replication shew that he has no cause of action, there shall be judgment for the defendant, though the bar be defective; for the court will form their judgment from the whole record: as, in escape at London, the defendant pleads a retaking upon fresh suit at Stoke, and the plaintiff replies that he was out of his

view before the retaking: this admits the retaking on fresh suit, and therefore the plaintiff shall not maintain an action for an escape; though a re-taking at another place would be a bad plea on demurrer. R. 3 Co. 52 b. [Duplicity in a plea, also, is cured by the plaintiff's replying instead of demurring specially. 2 H. 6, 14. 4 E. 4, 35, a. 6 E. 4, 2 a. L. 5 E. 4, 124 a. Doct. Pl. 70. 279. So in all cases of *mistakes in form merely, which should be taken advantage of by special demurrer, if the plaintiff demur generally or reply, the defect in the plea is thereby cured. See Hob. 298. 321. Latch. 179. Stat. 27 El. c. 5, s. 1. 4 Ann. c. 16.] But defects in point of substance, cannot be aided by a replication: D. 8 Co. 120 b. [10 Co. 94 a. Co. Lit. 303 b.:] as if the defendant plead an agreement, and do not shew a satisfaction; if the replication deny the agreement, this does not aid the bar. Kit. 237 b. Com. Dig. Pleader, E. 37. So, if the defendant plead not guilty to part and a justification to the residue, nothing in one plea shall aid a defect in the other; for they are distinct pleadings. R. 2 Cro. 67. See Com. Dig. Pleader, M. 9. 2 Wills. 150.

By Verdict, &c.] Pleas are aided at common law, after verdict for the party who pleaded them, in the same cases as declarations; namely, where the matter defectively stated or omitted (not amounting to a defective title or the omission of title,) is such as must necessarily have been proved at the trial, in order to entitle the party pleading to the verdict he has obtained. See 2 Arch. Pr. C. P. 261. 273. Bal. N. P. 321. Ante, p. 163. But where there is a defect, omission or imperfection, in some collateral parts of the pleading that were not in issue between the parties, so that there can be no room to presume that the defect or omission has been supplied by proof, a verdict will not cure it at common law, 1 Saund. 228 a., although in some cases it would under the statute of joefails. Thus where a pleading, justifying under a right of common, should have averred that the cattle were levant and couchant on the party's land, and issue was taken on the prescription only, a verdict in favour of the prescription was holden not to aid the omission of this averment at common law; Cro. Jac. 44. Cro. El. 458; although it would now be aided by the statutes of joefails. As to the cases in which a plea is aided by the statutes of joefails, see 2 Arch. Pr. C. P. 281; and as to the cases in which it may be amended, either at common law or by the statutes of amendments, see Id. 280.

We have now considered the cases in which a plea is aided by a verdict for the defendant. On the other hand, if the plaintiff have a verdict and the plea be insufficient, the defendant shall not be allowed to take advantage of his insufficient pleading. R. 5 Mod. 237. Com. Dig. Pleader, E. 38. and see 2 Lev. 234.

Bad in part, bad for the whole.] A plea cannot, like a declaration, be bad in part, and good for the residue; but if an entire plea be bad in part, it is bad for the whole. Thus, in trespass for breaking and entering the plaintiff's close, and with cattle eating up his grass, if the defendant plead a justification, which is good as to the breaking and entering the close, but bad as to the trespass with the cattle, the plea is bad for the whole. R. 1 Saund. 27. [And upon the same principle, if two or more join in a defence, which is a sufficient justification for one but no justification for the others, the plea is bad as to all. 1 Str. 509. 994. 1184. 3 T. R. 376, 377. per Buller, J. 1 Saund. 28. (n. 2.)] So in assumpsit on several promises, if the defendant plead the statute of limitations, which is a bad plea as to one count but not as to the others, the plea is bad for the whole. R. 1 Lev. 48. In debt against an executor or administrator, where the defendant pleads several judgments, and no assets *ultra*; if the plea be bad as to one of the judgments it is bad for the whole: as, for instance, if one of the judgments were against the testator and B., and he do not shew that the testator survived; for otherwise he should not be charged with it. R. 2 Saund. 50. [See upon this subject 1 Saund. 337. (n. I.)] In covenant, and several breaches; if the defendant plead outlawry in bar, which is a bar as to one breach, but not as to the others; the plea will be bad for the whole. R. Lutw. 515. Com. Dig. Pleader, E. 36. A plea of set off, however, is not considered to be within this rule, for it is more in the nature of a declaration. 2 W. Bl. 910. Nor does the rule apply, where the objectionable part of the plea may be rejected as surplusage. See 3 T. R. 374.

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*CHAPTER III.

THE REPLICATION.

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- SECT. 1. *The Matter and Form of a Replication.*
 2. *Its Requisites.*
 3. *Defects in it, in what Cases aided.*
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SECT. I.—*The Matter and Form of a Replication.*

As to the matters of which the courts will take official notice, without being pleaded, namely, general statutes, the rules of the common law, general customs, &c.; and as to the matters of which the court will not take official notice, and which consequently must be stated in the pleadings:—what has been already said ante, p. 171, 95, as to pleas and declarations, is equally applicable to replications. Also, as a plea is either a denial, or a confession and avoidance, of the complaint stated in the declaration; so a replication is either a denial, or a confession and avoidance, of the defence stated in the plea. A replication also, in the same manner as a plea, may consist of matter of estoppel. And formerly a protestation might be taken in a replication, in the same manner and under the same circumstances as in a plea; 2 Saund. 103 a. (n. 1.) but now, by Reg. Pl. H. 4 W. 4, l. s. 12, “no protestation shall hereafter be made in any pleading, but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.”

But although the matter of a replication bears a close analogy to that of a plea, yet they differ materially in form; instead therefore of adopting a similar arrangement to that observed in the last chapter, it will be more convenient to treat of the matter and form of replications under the following heads: namely—

1. *Where the Plea concludes to the Country.*
2. *Where the Plea concludes with a verification.*
3. *Where the Plea concludes with a verification by the Record.*
4. *Replication to a Plea of Nul tiel Record.*

1. *Where the Plea concludes to the country.*

If a plea concludes to the country, the plaintiff is thereby *precluded from replying any new matter, but must join issue upon the plea. Co. Lit. 126 a. This is done by adding what is termed the *similiter*. If here be but one plea, the plaintiff, in making up the issue, adds the *similiter* after the entry[of the plea, thus: "*And the said plaintiff doth the like.*" If there be several pleas, all concluding to the country, the *similiter* is added in the issue, in a new paragraph, in this form: "*And the said plaintiff, as to the said several pleas of the said J. S. by him above pleaded, and whereof he hath put himself upon the country, doth the like.*" But if some of several pleas conclude to the country, and some with a verification, the plaintiff in that case pleads the *similiter* to the pleas concluding to the country, together with replications to those concluding with a verification, and delivers them to the opposite party or his attorney, in the ordinary way. The form is thus:—

In the King's Bench, ["Common Pleas," or "Exchequer of Pleas,"] The—day of—6th William 4th.

N.) "*And the said plaintiff, as to the plea of the said J. S. by him*
v. { *first above pleaded, and whereof he hath put himself upon the*
S.) *country, doth the like.*

"*And the said plaintiff, as to the plea of the said J. S. by him secondly above pleaded, saith that*" [&c. so continuing the replication.]

The want of a *similiter* is aided after verdict; Cowp. 407. 3 Bur. 1793; although formerly deemed otherwise. 2 Str. 1117. 1 Str. 641. 8 Mod. 376. So, if the plaintiff by mistake join the *similiter* by the defendant's name, it is aided after verdict, 1 Ro. Abr. 200, pl. 27, 30. Cro. Jac. 587. Skin. 591. 8 Co. 161 b. 1 Str. 551. 2 Saund. 819. (n. 6.)

2. *Replication, where the Plea concludes with a Verification.*

Commencement.] The form of the commencement of a replication, where there is but one plea, is thus:—

In the King's Bench, ["Common Pleas," or "Exchequer of Pleas,"] The—day of—6th William 4th.

N.) "*And the said plaintiff saith that*" [&c., stating the matter of
v. { the reply.]
S.)

Where there are two or more pleas, or where the replication is to part of a plea only, it must specify to what plea, or to what part of

the plea, it is pleaded, R. Lutw. 241, in the same manner as was directed ante, p. 168, with reference to a plea; thus: "And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, saith that" &c.; or "as to so much of the said plea of the said defendant by him secondly above pleaded as relates to [the said writing obligatory in the said plea mentioned] saith that" &c. Where in assumpsit on several promises, the defendant pleaded infancy, and the plaintiff replied that part of the goods were for necessary food, and part for clothes; the replication was helden bad, "because it did not shew what part was for the one, what for the other. R. Lutw. 241.

The plaintiff also may reply to several pleas, by the one replication; R. 1 Leon. 124. R. 1 Sid. 39. R. Dy. 182; and the form in such a case will be thus; "*And the said plaintiff, as to the said several pleas of the said defendant, by him first, secondly and thirdly above pleaded, saith that*" &c.

Formerly the replication commenced with, what was termed, a "*precludi non*," which alleged "*that the plaintiff, by reason of any thing by the said defendant in his said plea above alleged, ought not to be barred from having and maintaining his aforesaid action against him the said defendant.*" But now, by Reg. Pl. H. 4 W. 4, l. s. 9, it shall not be necessary, in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of *precludi non* or to the like effect; provided that nothing herein contained shall extend to cases where an estoppel is pleaded.

If the replication consist of matter of estoppel, the commencement is thus: "*And the said J. N. saith that the said J. S. ought not to be admitted or received to plead the said plea by him secondly above pleaded, as to so much thereof wherein he alleges that*" [&c. stating the matter you conceive the defendant was estopped from alleging in his plea;] *because he saith that*" &c. See ante, p. 212.

Where the defendant in his plea pleads a deed with profert, the plaintiff is entitled to oyer, in precisely the same cases as a defendant, when a deed is pleaded with profert in the declaration. See ante, p. 168.

General Traverse.] Where the plea confesses and avoids the matter of the count, the plaintiff in his replication may either deny, or confess and avoid, the matter of avoidance; see 1 And. 166. 1 Leon. 77; and the denial, may be either a general or a special traverse, in the same manner as in the case of pleas. See ante, p. 177. 181. First then as to a general traverse. If the defence stated in the plea, consist of a single fact, the plaintiff in his replication may deny the fact, and conclude to the country. So, if the defence consist of several facts, each of which are so essential to it, that, if omitted, the plea would be defective

and bad, the plaintiff in his replication may deny any one of such facts, and conclude to the country. 4 H. 7, 9. Per Brian. Doct. Pl. 254. Or, it seems, he may traverse them all in the same replication, without rendering his replication thereby bad for duplicity: thus, in *Robinson v. Rayley*, 1 Bur. 316, the defendant having justified under a right of common, the plaintiff by his replication traversed "that the cattle were the defendant's own cattle, that they were levant and couchant upon the premises, and commonable cattle." To this there was a special demurrer, assigning for cause "that the replication was multifarious, and that several matters (specifying them) were put in issue, whereas only one single matter ought to be so." But the court held the replication to be good; and Ld. Mansfield, C. J. said, "It is true you must take issue upon a single point; but it is not necessary that this single point should *consist only of a single fact. Here the point is that the cattle are entitled to common; this is the single point of the defence. But in fact they must be both the defendant's own cattle, and also levant and couchant; which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite." As to what matters are traversable, see ante, p. 196—192. 1 And. 166. 1 Leon. 77.

Where the defendant's plea extends, not only to the matter in the declaration, but also to something else, the plaintiff may narrow his traverse, and confine it to that part of the plea which is an answer to the declaration. As if, in trespass in A., the defendant plead a right of common *pur cause de vicinage* in A. and B; the plaintiff may traverse the right in A. alone, without traversing the right in B. Per. Dennison, 1 Wils. 339. S. P. 36 H. 6, 18 b. Bro. trav. sans ceo, 156. 1 Saund. 268. (n. 1.) But where the matter pleaded is entire and indivisible, the plaintiff, if he traverse it at all, must traverse the whole; as, where the defendant prescribed for liberty of digging for stones in two closes, one the close in which &c., the other called S. G., and the replication traversed the prescription as to the close in which &c. only: the court held the replication bad; for the prescription being in its nature entire, it could not be denied in part, but the whole should have been traversed. 4 T. R. 157.

In an action on a promise to pay the debt of another, the defendant pleaded that no agreement or note in writing was signed by the defendant, &c.; to which the plaintiff replied generally that there was such an agreement, (without setting it out,) and concluded to the country: the court intimated a strong opinion that the replication was therefore bad, but gave the plaintiff leave to amend. *Lowe v. Eldred*, 3 Tyr. 234. See *Wakeman v. Sutton*, post. p. 504 g.

Where the matter in the plea, intended to be traversed, is in the affirma-

live, the replication denies it in terms; if in the negative, the replication asserts the affirmative of it, in terms. But in both cases care should be taken not to make the day, place or other circumstances attending the fact traversed, parcel of the issue, lest the traverse should be too large, or be a negative pregnant; see ante, p. 198; it should be traversed *modo et forma*, as directed ante, p. 221.

Where the replication is thus in the affirmative, it is in some cases, necessary, in debt on bond, that it should also assign with certainty the breach for which the action is brought. Thus, where the plaintiff declares in debt on bond, and the defendant sets forth the condition on oyer which is for the performance of an award, and pleads no award; the plaintiff in his replication must not only shew the award, but he must also assign a breach. R. 1 Saund. 102. Cro. El. 320. R. Yelv. 25. Cro. El. 899. Adm. Yelv. 78. R. Yelv. 152, 153. Hob. 198. [and see 1 Saund. 103. (n. 1.)] And the same, if the defendant plead what is tantamount to no award; as that two arbitrators did not make the award, but that it was made by an umpire. Semb. Lutw. 529. R. 2 Cro. 220. And the same in all cases where the defendant's plea does not admit a breach. Show. 214. [See 1 Lev. 83.] So, in debt on bond where the defendant sets forth the condition on oyer, which is to pay the costs in such a suit, and pleads payment; the plaintiff in his replication must shew a breach, it being a bond to do a collateral act. Adm. Lutw. 422. Or if the condition were to pay *quamdiu* he enjoyed such an office, and the defendant say that he enjoyed it for the life of B., and paid the whole time; if the plaintiff reply that he did not pay for that time, or enjoyed it longer, he must assign a particular breach. R. 1 Mod. 227. Or if the condition were to *perform covenants, and the defendant plead performance; the plaintiff in his replication must assign a breach. Hob. 14. So, the breach assigned must be certain, and cannot be so general as in a declaration in covenant; and therefore that he sold to A. and others several times between such a day and such a day, is not sufficient in a replication. Semb. 1 Salk. 140. [See 2 Wils. 11. 267. 293. 1 Bur. 574. 2 Bur. 772. 1 Str. 227. 1 Marsh. 441. Ante, p. 221.] If the plaintiff do not assign a breach when he ought, it is fatal on a general demurrer; D. Hob. 233. 198; and the same, if he assign a bad breach; nor is it aided after verdict. R. 2 Saund. 180. R. Yelv. 153. Com. Dig. Plender, F. 14. But in all cases (excepting that of a bond conditioned for the performance of an award) if the defendant pleads a special matter which admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged, without assigning a breach; for he that excuses a non-performance, supposes it; and the plaintiff need not shew that which the de-

fendant has already supposed and admitted. Per. Holt, 1 Salk. 136. Carth. 116. 1 Str. 191; and see Com. Dig. Pleader, F. 15 and 12. The reason why an action on a bond conditioned for the performance of an award, is an exception to this rule, is, that an award may be good in part and void for the residue, and it is necessary therefore to shew the court that the action is brought for a breach of that part of the award which is good. See 1 Saund. 103 and (n. 1.)

Where the plea concludes with a special traverse of a particular fact concluding of course to the country, the plaintiff can only reply by adding the *similiter*. For it is a general rule, that if there be a traverse of a point apt and material to the plaintiff's title, he cannot refuse it and tender another traverse: as, if the plaintiff in *quare impedit* count that the advowson was granted to A. and B. for years, and that B. survived and granted to the plaintiff, whereby &c.; and the defendant plead that A. survived and granted to him the next avoidance, *absque hoc* that B. survived: the plaintiff cannot waive the traverse of the survivorship, and traverse the grant of the next avoidance. R. Hob. 105. So, if he count of a seisin in fee in B, who granted &c.; and the defendant shew a seisin *pur auter vie*, and traverse the seisin in fee: the plaintiff cannot waive the traverse, and traverse the seisin *pur auter vie*. Semb. Hob. 104, 105. Moor, 869. Nor can a man take a traverse upon a traverse, in any case where the first traverse is material. D. Vaugh. 62. Even the king, in general, cannot take a traverse upon a traverse, if the first traverse go to his title, and the title do not appear upon record. Vaugh. 62. Com. Dig. Pleader, G. 17. See ante. p. 195. 1 Saund. 22. (n. 2.) Cro. Car. 105. 2 Lutw. 1630. Bac. Abr. Pleas, H. 4.

Formerly, when the plea concluded with a special traverse of the time or place stated in the declaration, the plaintiff had his option either to join in the traverse, as above directed, or to traverse the inducement. R. Cro. Car. 105. [Ante, p. 193, 214, 215.] Thus, if in trespass in such a county, the defendant pleaded a concord for trespass in every other county, and traversed the county, the plaintiff might join issue on the county, or traverse the concord. Co. Lit. *282 b. R. Moor, 428. So, if the defendant pleaded recovery and execution in Sandwich, and traversed the place in the declaration, the plaintiff might traverse the record of the recovery. R. Moor, 350. Poph. 101. Hob. 104. Lutw. 1438. So, in trespass such a day, if the defendant pleaded a licence on another day, and traversed all days before and since, the plaintiff might traverse the licence. Hob. 104. So, if he pleaded a feoffment or release, and traversed all days before, the plaintiff might traverse the feoffment or release. Id. Com. Dig. Pleader, G. 18; and see Bac. Abr. Plea, H. 4. But

the inducement can no longer be traversed in these cases ; as by Reg. Pl. H. 4 W. 4, l. s. 13, a special traverse now concludes to the country and that rule allows of a traverse of the inducement only where the special traverse is immaterial. See ante, p. 231.

But when the traverse in the plea is immaterial, and not to the substance and point of the action, the plaintiff may either pass it by and traverse the inducement, or he may demur specially for this cause. Ante, p. 193. Thus, where in waste for cutting down and selling trees, the defendant pleads that he used them for repairs, and traverses the selling: the plaintiff may waive this, and traverse the using in repairs; for the point first traversed was not material to the action, it was surplusage in the declaration, and should not have been traversed, and the plaintiff might on that account have demurred to the traverse. Hob. 104. So, in *quare impedit*, if the plaintiff say that A. was seised in fee, and presented B., and granted the next avoidance to plaintiff; and the defendant say that C. was seised before A., and granted to A. for the life of D., who presented B. and then granted the next avoidance &c., *absque hoc quod A., tempore concessionis*, was seised in fee; the plaintiff may traverse the seisi: for the life of D. Hob. 101. Com. Dig. Pleader, G. 19; and see 1 Saund. 22. (n. 2.) Lutw. 1632. 1 Saund. 22. 1 Lev. 192. 1 Str. 117. Fortesc. 349. Bac. Abr. Pleas, H. 4. 1 H. Bl. 376.

Special Traverse.] A special traverse is required in a replication, in precisely the same cases in which it is requisite in a plea. See ante, p. 181—195. Thus, where the declaration is general, without stating a title, and the defendant sets out a title in his plea; if the plaintiff state a title in his replication inconsistent with that pleaded by the defendant, he must conclude with a special traverse of the title in the plea. Cro. El. 30. See 1 Str. 5. W. Jon. 400. So, if it be alleged by the defendant that A. B. died seised in fee, and the plaintiff allege that he died seised in tail, the replication must traverse the dying seised in fee. 5 H. 7. 11, 12. Doct. Pl. 349. Dy. 312 b. 1 Leon. 78. So where in debt on bond conditioned for appearance Oct. Martini, the defendant pleads the stat. 23 H. 6, and that he was imprisoned by a writ returnable *Quinden. Martini*; if the plaintiff reply that he was imprisoned by a writ returnable *Oct. Martini*, he should traverse the imprisonment by a writ returnable *Quinden. Martini*. R. 2 Lev. 175.

What has been above said, as to cases where the declaration is general, and the defendant makes title in his plea, relates principally to real actions. So, in trespass *quare clausum fregit*, case *for disturbance &c. (in which we have seen it is not necessary to state a title in the declaration, ante, p. 92.) if the defendant justify under a title, the plain-

tiff must shew a title in his replication. *Stroud v. Birt*, B. R. Trin. 8 W. 3. 4 Mod. 424. Com. Dig. Pleader, C. 40. Poph. 2. sed vide infra. But where a title need not be shewn in order to maintain the action, there, though the defendant confess and avoid the plaintiff's title, it is sufficient for the plaintiff to traverse or deny the matter alleged by the defendant, without shewing any title by his replication. Cro. El. 288. 671. [Fortesc. 376.] As in trespass, if the defendant plead title in A., who was disseised by the plaintiff or his lessor, and afterwards re-entered; the plaintiff may traverse the disseisin, without making a title at large to himself or his lessor. R. Cro. El. 891. So, if he plead title in A., who demised to the defendant, and give colour to the plaintiff by a feoffment to him by A., by which nothing passed, the plaintiff may traverse the demise without making title; for the bar, by the colour given, admits possession in the plaintiff, if there were not a demise. R. Poph. 1. Com. Dig. Pleader, F. 13.

In an action for maliciously suing out a commission of bankrupt, the defendant pleaded that the plaintiff being a trader, and being indebted to him in 100*l.*, became bankrupt, wherefore defendant sued out the commission; replication, *de injuria*; demurrer, assigning for cause, that the plaintiff by the replication attempted to put in issue three distinct facts, the act of bankruptcy, the trading and the petitioning creditor's debt: but the court held, that these three facts connected together, constituted but one entire proposition, and that the replication was therefore good. *O'Brien v. Saxon*, 2 R. & C. 908; 4 D. & R. 579.

De injuria sua propria.] If the defendant plead merely in excuse of an injury to the person or reputation of another *de son tort demesne sans tiel cause* is a proper replication. 8 Co. 67 a. Crogate's case. See 2 R. & C. 908. Thus, in an action for assault and battery, if the defendant plead *son assault demesne*; 8 Co. 67 a. [5 H. 7, 6;] or that the plaintiff entered upon his possession, and that he *molliter manus imposuit* to put him out, and if he had received damage it was on his own assault; R. Latch. 128. 221; or, that he being rector, and the tithes served, the plaintiff would have carried them away, and in defence of his tithes *molliter manus imposuit* &c.; R. 2 Cro. 224; Yelv. 157; [or that he, being master of a ship, ordered the defendant (who was a sailor on board) to do a certain duty, which the latter refused to do, and that he thereupon *moderate castigavit* the plaintiff; 1 Vent. 70. 1 Sid. 444;] or, in trespass for false imprisonment, if the defendant plead that the plaintiff broke the peace, and he being a constable and present, took him to carry him to a justice of the peace; *Bro de son tort*, 18: or that he, being a constable, took the plaintiff as a vagrant, Id. 20, or on hue and cry for robbery, Id. 39, or that he restrained the

plaintiff, who was a lunatic; *Id.* 44. 51; or in an action on the case for defamation, if the defendant excuse himself by reason of a hue and cry: 8 Co. 67 a: in all these cases, the general replication of *De injuria sua propria absque tali causa*, is the proper replication. Com. Dig. Pleader, F. 18. 1 Saund. 244 a. (n. 7.) So, in replevin, if the defendant avow the taking under a warrant of distress for poor-rates, stating the rate &c., the plaintiff's refusal to pay, the warrant and seizure under it &c.: the plaintiff may plead in *de injuria*. *Selby v. Bardons*, 3 B. & Ad. 2, per J. Parke & Patterson, JJ. Lord Tenterden, C. J. diss. confirmed in the Ex. Chamber. 9 Bing. 756.

The general replication, *de injuria*, though usually adopted in trespass and case only, may be pleaded in assumpsit, where the plea admits a breach, and contains only matter of excuse for having committed it: and therefore, where in an action by the indorsee against the maker of a promissory note, the plea stated several facts showing that the note had been obtained from the defendant by fraud, of which the plaintiff had notice, it was holden that the replication *de injuria* was a good replication. *Isaac v. Farrar*, 1 Tyr. & Gr. 281.

So, in replevin, where the defendant, as the collector of poor's rate, and his servants, avowed and made cognizance as for a distress for poor rates, stating the rate, the summons before the justices at petty sessions, their warrant to distrain &c.; and the plaintiff pleaded in bar *de injuria*: it was holden by the Court of Exchequer Chamber, in error from the Court of King's Bench, that *de injuria* may be pleaded in bar in replevin, in the same manner and under the like circumstances, as it may be replied in trespass; and that although the avowry &c., prayed a return of the goods, yet the defendants did not claim any property in them before the time of the distress, and therefore *de injuria* was a good plea in bar. *Bardons v. Selby*, 5 Tyr. 430; and see S. C. 3 B. & Adolph. 2.

Also, if the defendant justify, and his justification consist wholly of matter of fact, *de son tort demesne*, generally, is a good replication: as, in false imprisonment, if the defendant justify by process out of the admiralty court, hundred court, county court, or other *court not of record; 8 Co. 67 a; [or justify as constable, for an assault committed upon him by the plaintiff; 5 H. 7, 6;] or, in an action for words, if the defendant justify by reason of a robbery by the plaintiff; 2 Leon. 103. 1 Saund. 243; or, in an action for a conspiracy, if the defendant justify for suspicion of felony, on which the defendant was bound by a justice of peace to prosecute; Winch. Ent. 108. Vid. Ent. 147; or, in trespass, if the defendant justify the taking for a heriot, *Bro de son tort*, 5. 10, or for estovers; or, in replevin, if the defendant avow for the

penalty of a bye-law made within the manor, according to the custom, R. 3 Lev. 48. Lev. Ent. 156, or for a distress for the poor's rate; 43 El. c. 2. [and see 3 B. & Ad. 2 ante, p. 249:] in these cases *de son tort demesne* is a good replication. Com. Dig. Pleader, F. 19.

In trespass for breaking and entering a house and taking goods, where the defendant justifies as landlord under a distress for rent, the replication *de injuria* is bad on general demurrer. *Hooker v. Nye*, 4 Tyr. 777.

But if matter of record form the gist of the defence, *de son tort demesne* generally is no replication. So, if the plea consist of matter of record and also matter of fact, *de son tort* generally is not a good replication: for *sans tiei cause* goes to the whole plea, and then matter of record would be put in issue by this general replication: but the plaintiff should say *de son tort &c.*, and traverse the matter of fact: as, in false imprisonment, if the defendant justify by a *capias* to the sheriff and a warrant to the defendant, the plaintiff cannot reply *de son tort &c.*, without traversing the warrant. 8 Co. 67 a. R. 3 Lev. 65. [19 H. 6, 7 a.] So, in an action for words, if the defendant justify by reason of perjury in a court of record, *de son tort &c.* is not a good replication without a traverse. Semb. 2 Leon. 81. 102. And the same in trespass, if the defendant justify by process out of an inferior court of record. Semb. Hardr. 6. [and see 21 H. 6, 5 a. 3 H. 6, 34, 35. Doct. Pl. 113.] So, if the defendant justify by the custom of a manor, *de son tort &c.* generally is not a good replication, without traversing the custom. R. Hob. 76. Cont. per 3 J. Lev. acc., 3 Lev. 49. Yet, where the defendant justifies by custom of foldage, *de son tort &c.* is a good replication. Kit. 223 a. And if the matter of record be only inducement to the plea, *de son tort &c.* may be replied generally: as in trespass, if the defendant plead a presentment in a Swainmote court, and that he as forester requested him to answer, and, because the plaintiff refused, he took him: *de son tort &c.* is a good replication; for the presentment is only inducement. D. 2 Leon. 81. Com. Dig. Pleader, F. 20. See 3 B. & Ad. 2.

So, if the defendant, by his plea, claim in his own right any interest in the land, *de son tort &c.* generally is not a good replication. 8 Co. 67 a. R. 2 Saund. 295. 1 Lev. 307. And the same, if he claim any interest out of the land: as common, R. 8 Co. 67 a, or rent, 8 Co. 67 a, or a way or passage over the land, 8 Co. 67 a. R. 2 Cro. 599. [It. 4 Leon. 16.] or trees cut down on the land. R. Cro. El. 539. So, if the defendant claim, as servant to another, any interest in or issuing out of the land, &c. *de son tort &c.* is not a good replication, without traversing the command, where that appears to be material; 8 Co. 67 a.

[1 B. & P. 76;] and so it seems to be intended, Cro. El. 14, 540. And therefore in replevin, if the defendant as bailiff make conuſance for *damage feasant*, and the plaintiff plead that A. was ſeiſed of two parts, by whose licence he *put his cattle there; *de son tort* generally is not a good replication. R. on demurrer, Cro. El. 812. So, if the plaintiff make title in his declaration, and the defendant plead a title in avoidance of the cause of action, or in destruction of the plaintiff's title, *de son tort &c.* is not good without a traverse: as, in trespass for taking his servant, if the defendant plead that the father of the servant held of him in chivalry, &c., and he took the servant as his ward; *de son tort &c.* is not good, without a traverse of the seignior. D. Yelv. 158. 1 Brownl. 215. So, where the defendant in trespass makes title by devise, *de son tort &c.* is not a good replication. R. 1 Lev. 307. Yet, if the title alleged be only inducement, *de son tort &c.* may be replied generally; as in battery, if the defendant plead that he was ſeiſed in fee of a close, and had cut his corn, that the plaintiff would have taken away the corn, and that he in defence &c. *de son tort &c.* was holden to be a good replication. R. Yelv. 157. R. Latch. 221. 1 Brownl. 215. [Cro. Jac. 224.] Com. Dig. Pleader, F. 21, and see Doct. Pl. 114. See 3 B. & Ad. 2.

Where in trespass for assault and battery, the defendant justified as the servant of A. & B., in turning the plaintiff out of their premises, by their command; and the plaintiff replied *de injuria* which was demurred to: the court intimated a strong opinion that the replication was good for it is only where the defendant justifies by command of the plaintiff, and not of a third person, that *de injuria* is not allowed. *Pigott v. Kemp*, 3 Tyr. 128.

So, if the defendant justify by authority derived mediately or immediately from the plaintiff, though he claim no interest, yet *de son tort &c.* generally is not a good replication: 8 Co. 67 a: as if the defendant justify by the licence or command of the plaintiff. Kit. 221 b. Com. Dig. Pleader, F. 22. So, if the defendant justify by authority of law, as to view waste; 8 Co. 67 b; or if he justify by statute, as where the defendant justified the cutting of leather as a searcher, by stat. 1 J. 1, c. 22: Semb. 2 Rol. 694, l. 10. but see Brown. Vad. 435: in these cases the plaintiff cannot reply generally *de son tort demesne &c.* Com. Dig. Pleader, F. 23, and see Doct. Pl. 115.

The form of this replication is thus: "And the said plaintiff, as to the plea of the said defendant by him first above pleaded, saith that the said defendant at the said time when &c. of his own wrong, and without the cause by him in his said first plea alleged," [assaulted, beat, &c.: here, state, generally, the substance of that part of the declaration answered by the plea:] "in manner and form as the said plaintiff hath

above in his declaration" [or "in the said first count of his said declaration"] complained against him the said defendant; and this he the said plaintiff prays may be inquired of by the country, &c." If the *absque tali causa* be omitted, the replication will be bad; Semb. 2 Cro. 599. R. 1 Rol. 47; but this shall be aided after verdict. D. 1 Vent. 70. Semb. cont. 1 Sid 341. Hardr. 40. [R. cont. Styl. 150. 196. 210. If, on the contrary, the plaintiff not only insert the *absque tali causa*, but also add a special traverse of part of the plea, the replication will be bad on a special demurrer, for duplicity; for it first traverses the whole of the plea, and then traverses a part. Fortesc. 379.] But *de injuria sua absque tali warranto*, where the defendant justifies by warrant, it seems, is good, without saying expressly *absque hoc* that there was such a warrant. Lutw. 1460. And *de son tort* to several pleas is good; for *absque tali casu* refers to them all. R. 1 Leon. 124. If the plaintiff reply specially, instead of *de son tort &c.* it is aided after verdict by stat. 32 H. 8, c. 30. R. 1 Sid. 445, 1 Vent. 70. So, if he *reply *de son tort* generally, where he ought not, it is aided after verdict by the stat. of Jeofails; R. Hob. 76. R. T. Raym. 50. R. 1 Brownl. 260; but bad on a general demurrer. 3 Lev. 65. Com. Dig. Pleader, F. 24.

Confession and Avoidance.] If the matter of the defence be true, so that the plaintiff cannot safely traverse it, he may admit it by his replication, and avoid it by a statement of new matter, in the same manner as a defendant may do by his plea, with reference to the declaration. See ante, p. 199—203. Formerly the confession was usually in express terms, thus: "True it is that" &c. But this is very seldom adopted in modern pleading; an implied confession, namely, by the replication not traversing the matter of defence, is sufficient. See Plowd. 48. 1 Salk. 91. Care, however, must be taken that the matter stated in avoidance, in the replication, be not inconsistent with a confession of the matter of defence in the plea; otherwise the replication will be bad on special demurrer.

Matter of Estoppel.] The plaintiff may state, in his replication, any matter of estoppel, by which the defendant is precluded from availing himself of the defence set up by his plea; in the same manner as the defendant may plead it, in bar of the cause of action stated in the declaration. And the rules already laid down, upon this subject, ante, p. 203—212, are applicable to replications, as well as to pleas. See 2 B. & Ad. 544. 278.

Conclusion. The conclusion of a replication is either to the country, or with a verification. The form of a conclusion to the country is thus: "and this he the said plaintiff prays may be inquired of by the country,

&c." The form of a conclusion with a verification is thus: "and this be the said plaintiff is ready to verify." In real actions, the replication concludes with a prayer for "judgment and selsin of the tenements above demanded with the appurtenances, to be adjudged to him, &c.; "in *quare impedit*, for "judgment and his damages, by reason of the said hindrance, together with a writ to the bishop, to be adjudged to him, &c." In personal actions, also, formerly, the replication always concluded with a prayer judgment that the debt or damages should be adjudged to the plaintiff. And this prayer of debt and damages, &c., was said to be necessary. R. Cro. El. 256. Adm. 1 Saund. 98. and see T. Raym, 182. Yet if the plaintiff prayed judgment and his debt, it was holden sufficient, and damages were given as incident. R. 1 Lev. 222. 2 Lev. 19. 1 Saund. 98. Com. Dig. Pleader, F. 5. But as the praying damages &c. seems not to have been an essential form of pleading, the omission of it would not be deemed bad even on a special demurrer: by praying judgment, every thing was included: and when the court gave judgment, it would consequently give the appropriate judgment, for debt and damages, &c., according to the form of the action. See 2 Lev. 19. 1 Str. 523. 1 Saund. 97. (n. 1.) But by *Reg. Pl. H. 4 W. 4, l., s. 9, it shall not be necessary, in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any prayer of judgment.

When the replication consists of a general traverse of the plea or part of it, it must conclude to the country. The general rule in pleading is, that where there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion must be to the country; T. Raym. 98. Carth. 87. 2 Saund. 180. 2 Bur. 1022; and the same, though the affirmative and negative be not in express words, but be only tantamount thereto. Co. Lit. 126 a. Yelv. 137. 1 Saund. 103. (n. 1.) and see ante, p. 230, 231. To a plea of accord and satisfaction, the replication, denying that the plaintiff received in satisfaction, must conclude to the country. 1 Saund. 103 b. To an avowry for rent in arrear, the plea in bar, denying that any rent is in arrear, must conclude to the country. Id. In debt on bond conditioned to pay all expenses, if the defendant plead that he paid all, and the plaintiff reply that he has not paid, the replication must conclude to the country. R. T. Raym. 98. So, in debt on bond conditioned to account on demand; pleas first no demand, and secondly that defendant accounted; a replication that a demand was made on such a day and that defendant did not account, should conclude to the country. 2 Bur. 1022. but see 1 Saund. 103. (n. 1.) In an action by an executor, where the defendant pleads that another executor, who has proved, administered and is living; the

replication denying it, must conclude to the country. 2 Str. 1220. So to a plea of *plene administravit*, the replication that the defendant had assets at the time of suing out the original, should conclude to the country. Semb. Lutw. 101. R. Yelv. 137. So the replication to *ne unques executor*, must conclude to the country. So in dower, a replication to *ne unques accouple*, alleging a marriage in Scotland, must conclude to the country. 2 H. Bl. 145. Indeed, it may be laid down as a safe general rule, that where the defendant in his rejoinder cannot take any new or other issue than the matter he had before pleaded, without a departure from his plea, or where the issue on the rejoinder must be the same in substance as on the plea, the replication should conclude to the country. As for example, if in trespass the defendant plead a licence, and the plaintiff deny it, the replication should conclude to the country, there being a direct negative and affirmative; for if it concluded with a verification, the rejoinder could only repeat what had already been alleged in the plea, namely, that the plaintiff did give him a licence. The same rule applies to a variety of other instances, such as defects of fences, prescriptions for common, or right of way, and in short to every case where formerly the replication usually induced the traverse with a repetition of the declaration, as by saying that the defendant of his own wrong committed the trespass or other matter complained of, and then added a formal traverse. In all these and the like cases, the better and shorter method is directly to deny the fact of defect of fences, prescription and the like, without a formal traverse, and conclude to the country. However, it must be owned, the general course of precedents in these and similar cases, is to traverse with an **absque hoc*, and therefore it is probable that the court would hold either way good.

If the replication assign breaches, (see ante, p. 246,) it concludes with a verification. 1 Saund. 102, and see Id. 103. (n. 1.) So, where to a recognizance in replevin for the arrears of an annuity, the plaintiff pleaded that no memorial of the deeds &c. was inrolled; and the defendant replied that there was, and set out the memorial at length, and concluded with a verification by the record: the replication was holden to be rightly concluded. 9 Bing. 57.

Where a replication consists of inducement and a special traverse, formerly it was holden that it should in all cases conclude with a verification; Co. Lit. 126 a. 2 Saund. 189. 2 Str. 871; and almost all the precedents in the books of entries are so. Afterwards the rule was qualified with this distinction, namely, that when the whole of the matter of the plea was denied by the replication, it should conclude to the country, notwithstanding it had an introductory inducement and the for-

mal words *absque hoc*, &c.; but when a particular fact alleged in the plea was selected and denied, the replication should conclude with a verification. 1 Salk. 4. 1 Bur. 317. Doug. 91. 412, 413. (n. 1.) 2 T. R. 442. 1 Saund. 103 a. But now, by Reg. Pl. H. 4 W. 4, l. s. 13, "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country; provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.

A replication of *de son tort demesne sans tiel cause*, must conclude to the country.

Where a replication confesses and avoids the matter of the plea, it should conclude with a verification. See 1 Saund. 103 (n. 1.) Thus, if the defendant plead the statute of limitations, and the plaintiff shew a writ sued out within the time, he must not conclude to the country; for he would thereby deprive the defendant of the opportunity of answering the new matter stated in the replication. R. Lutw. 101. R. 4 Mod. 376. So, where to a *scire facias* against bail, it was pleaded that the principal died before the return of any *ca. sa.*; it was holden that a replication stating the particular *ca. sa.* and that the principal was alive at the return of it, should conclude with a verification. 2 T. R. 576, and see Com. Dig. Pleader, E. 32. 4 Mod. 285. 10 Co. 52 a. 9 Bing. 51, ante, p. 232. It must be owned that there is some difficulty in this subject: not as to the general principle, which is plain and obvious; but in determining whether each particular case comes within it. In doing so, it is necessary first to inquire whether the replication states any new matter, which the defendant should have an opportunity of answering; or whether the issue which may be taken by the rejoinder, differ in substance from that which might have been taken on the plea: and if so, the replication should conclude with a verification.

If the replication consist of matter of record, the conclusion is thus: "and this he the said plaintiff is ready to verify by the said record."

The conclusion of a replication of an estoppel, is the same as in the case of a plea of matter of estoppel, as stated ante, p. 212.

*It may be necessary to mention that the want of a verification was aided after verdict, by stat. 16 & 17 C. 2, c. 8; and after judgment by confession or default, by 4 Ann. c. 16, s. 2. See 2 Arch. Pr. C. P. 281. And now, a wrong conclusion, either to the country or with a verification, is mere matter of form, and can be taken advantage of by special demurrer only. 4 Ann. c. 16, s. 1.

3. *Replication, where the Plea concludes with a verification by the Record.*

When the plea concludes with a verification by the record, the replication of *nul tiel* record is thus: "And the said plaintiff, as to the plea of the said defendant by him [secondly] above pleaded, saith that there is not any record of the said supposed recovery" (or "recognizance" &c.) "in the said plea mentioned, remaining in the said court of our said lord the king before the king himself" (or other court, according to the plea) "at Westminster aforesaid, in manner and form as the said defendant hath above in his said plea alleged; and this he the said plaintiff is ready to verify, when where and in such manner as the court here shall order direct and appoint." See 1 Barn. & Ald. 153. If the record pleaded be a record of the same court, the issue concludes with an entry of a *curia advisari vult*, giving a day for the inspection of the record; see the form, Arch. Forms, 315, 316, 324, and which is usually inserted by the pleader at the end of the replication. But if it be a record of a different court, the entry in that case states that the defendant is commanded to have the record in court on such a day, and to fail not therein at his peril. See the form, Arch. Forms, 321. 327. and see Com Dig. Pleader, 2 W. 12. 1 Arch. Pr. C. B. 311. 314. Or, when the record of another court is pleaded, the plaintiff may conclude his replication with a prayer of judgment and damages, &c. as ante, p. 280; but this is a very dilatory mode of pleading, as it requires a rejoinder re-asserting the record; and it is consequently much preferable to adopt the mode of pleading above-mentioned. See 1 Saund. 92. (a, 3.)

4. *Replication to a Plea of Nul Tiel Record.*

To a plea of *nul tiel record*, the replication is in this form: "And the said plaintiff, as to the plea of the said defendant by him [secondly] above pleaded, saith that there is such a record of the said recovery" (or "recognizance") "remaining in the said court of our said Lord the King before the King himself" (or other court, as in the declaration "as he the said plaintiff hath above in his said declaration in that behalf alleged; and this he the said plaintiff is ready to verify by the said record, when where and in such manner as the court here shall order direct and appoint. And he prays that the said record may be seen and inspected by the said court now here." Then, if the record pleaded be a record of the same court, follows an entry of a *curia advisari vult*, giving a day for the inspection of the record; see the

form, Arch. Forms, 316. 325 : but if it be a record of a different court, the entry states that the plaintiff is commanded to have the record in court, on such a day, and to fail not therein at his peril. *See the form, Arch. Forms, 321. 327. 1 Saund. 92. (n. 3.) and see 2 Arch. Pr. C. B. 311. 314.

SECT. II.

The Requisites of a Replication.

It must be triable.] The matter of a replication must consist of either matter of fact, or matter of record &c., in the same manner as has been already mentioned with reference to pleas ; see ante, p. 171 ; so that issue may be joined upon it, triable by the country, or by the record &c.

It must not be double.] A replication must not be double : that is, it must not contain two or more replies to the same defence. Therefore if the plaintiff reply *de son tort demesne sans tiel cause, sans ceo* that there is such a record, it is bad. 3 Lev. 243. Fortesc. 379. see ante, p. 174—176. Com. Dig. Pleader, F. 16. and see 1 Str. 317. But where several facts constitute the single point of defence upon which it is intended to take issue, the replication may traverse them all, without being objectionable for duplicity. 1 Bur. 316. Ante, p. 245. Where to a plea in abatement that another action was pending by B. and C. for the same cause, the plaintiff replied that they were both dead ; the replication was holden not to be double, for it was necessary to shew the death of both B. and C., to entitle the plaintiff to bring his action alone. 2 Lev. 82. 1 Vent. 236. So, in all cases where several facts constitute one entire answer to the defence, the replication may of course state them all, without being liable to objection for duplicity.

So, in the cases already mentioned (ante, p. 246.) where the replication assigns a breach, the replication is not on that account bad for duplicity, although it also contain an implied traverse of the plea : thus, if the defendant plead *no award*, and the plaintiff in his replication set out the award and assign a breach, the replication is good. 1 Mod. 227. So, if the defendant plead that he enjoyed an office for the life of B., and paid during his life ; and the plaintiff reply that he enjoyed *diutius*, and did not pay : the replication is not bad for duplicity. R. 1 Mod. 227. So, it seems, where matter is added, merely for maintenance of the count, it will not make the replication bad : as, in *quare impedit*, if the ordinary plead that he presented on a lapse ; and the plaintiff reply that he presented before a lapse, and that the

ordinary refused and afterwards presented on pretence of a lapse: the replication is not bad for duplicity; for the additional matter namely, that the ordinary presented on pretence of a lapse is alleged merely to maintain the cause of action mentioned in the count. Hob. 198.

Nor can a plaintiff, in general, plead different replications to different parts of the same plea. To this however there are a few exceptions. If an executor, defendant, plead several judgments &c. outstanding, the plaintiff may reply to any or all of them, at his option; although by avoiding any one of the judgments, the plaintiff will be entitled to recover. Yet the better way seems to be to answer only such judgment &c. as the plaintiff knows to have been obtained by fraud &c. 1 Saund. 336, 337. (n. 2.) 2 Saund. 49, 50. *1 Lev. 281. 1 L. Raym. 263. 1 Salk. 298. Carth. 431. See 1 Salk. 312. Hardw. 289. So, when a defendant pleads a set-off of different species of debts, as debt by judgment or recognizance, debt by bond, debt by simple contract &c., the plaintiff may reply to each. See 1 East. 369. So, in the common case of a plea of infancy, the plaintiff may reply that the goods mentioned in such a count were necessaries, that the money mentioned in such a count was laid out for necessaries, and he may enter a *nolle prosequi* as to such counts as he thinks he cannot sustain.

A plaintiff cannot have leave to reply double, under the stat. 4 Ann. c. 16; Fortesc. 335. Barnes, 333; unless he be plaintiff in replevin, in which case that statute expressly allows him to plead several pleas in bar, with leave of the court. See ante, p. 235 &c. Where the defendant pleads several pleas, of course the plaintiff may reply to each of them. And even where a plea is double, and would therefore be bad on a special demurrer, yet if the plaintiff reply to it, instead of demurring for the duplicity, it is said he must answer the double matter; 1 Vent. 272; but in a more recent case, where the defendant, in an action of trespass, justified under a prescriptive right to a duty, and also a prescriptive right to distrain for it; and the plaintiff in his replication traversed the prescription for the duty, but not the prescriptive right to distrain; yet, on demurrer for this cause, the replication was holden good. 1 Wils. 338.

Where a defendant in assumpsit pleads that the contract declared upon was a guarantie for the debt of another, and that no memorandum thereof, stating the consideration, was or is in writing, signed by the defendant or any person authorized by him: it was holden that the plaintiff might reply, that a memorandum of agreement in writing, stating the consideration, was signed by the defendant, without setting out such

memorandum in the replication. *Wakeman v. Sutton*. 2 Ad. & E. 78. See *Lowe v. Eldred*, ante, p. 504 f.

The only mode of objecting to a replication for duplicity, is by special demurrer. 1 Saund. 336, 337. See ante, p. 176.

It must be certain.] A replication requires more certainty than a declaration. Semb. 1 Salk. 140. [See ante, p. 108—111.] But certainty to a common intent is sufficient: as, in trespass for taking three loads of oats, if the defendant justify for damage feasant, and the plaintiff reply that *tempore quo et diu antea* he was parson, and took for tithes; though he do not say that he was parson at the time of the severance, yet it shall be intended. R. Cro. Car. 63, and see 4 Bing. 202. So, if the defendant justify under a devise from B., and the plaintiff say that the land descended to him as cousin and heir to B., and traverse the devise; it is sufficient, without saying how cousin. R. 2 Cro. 86. Com. Dig. Pleader, F. 17. So, in debt on bond conditioned to prosecute a writ of error in the court of Hustings with effect, a replication stating that the writ of error was non-prossed in the Hustings, was holden good, although it did not state before whom the court of Hustings was holden, or that the writ of error was returnable. 1 Wils. 123. So, much certainty is not required, where the certainty lies within the knowledge of the defendant, and probably not of the plaintiff: thus, in debt on bond, the defendant having prayed oyer of the condition, (which was, that the defendant, who was appointed agent of a regiment, should well and duly pay all monies he should receive for the use of the regiment, and faithfully account, and indemnify the plaintiff,) pleaded a general performance, and that the plaintiff was not damnified; to which the plaintiff replied that the defendant received from the paymaster-general, for and on account of the said regiment, "several sums of money, amounting in the whole to 1400*l*." but *that the defendant had not paid them: on demurrer to the replication, the court held the breach therein to be alleged with sufficient certainty; 2 Bur. 772; because the certainty as to the sums received, and when, where and from whom, must be deemed to be within the knowledge of the defendant, rather than of the plaintiff. See 1 B. & P. 640. 8 T. R. 459. S. P. But where in debt on bond conditioned to perform articles of agreement, (by which the defendant agreed to take all his malt liquors from the plaintiff and to pay for the same, reserving to himself a liberty to purchase his other liquors from other persons,) the defendant having pleaded performance generally, the plaintiff replied that there was such a quantity of liquors unpaid for; the court, upon demurrer, held the replication bad for uncertainty, because it did not state whether the liquors unpaid for were malt

liquors or otherwise; 1 Str. 227; for that lay within the knowledge of the plaintiff. So, where, in assumpsit on several promises, the defendant pleaded infancy, and the plaintiff replied that part of the goods were for necessary food, and part for clothes, without specifying what part for the one, what for the other; the replication was holden bad for uncertainty. R. Lutw. 211.

It must be positive.] A replication, like a plea, must be direct and positive, and not by way of rehearsal or argument. See ante, p. 222. Thus, where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal &c.: it is not enough for the plaintiff to reply that as well all the veins of coal under the said closes in which &c., as the rest of the soil within and under the same, had immemorially been parcel of the manor, and demised and demisable by copy &c., without exception or reservation of the coal &c., unless he also traverse the liberty of working the mines: because the plea claims such liberty, not merely as annexed to the seisin in fee, to be exercised when in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate; and therefore the replication is only an argumentative denial of the liberty, and does not confess and avoid it. 10 East, 189.

It must not be repugnant.] A replication, like a declaration or plea, if it be repugnant or insensible, is bad. See ante. p. 224. 112.

It must not depart from the declaration.] The replication must be conformable to the count; and therefore, in trespass for a wrongful taking and detaining in prison, if the defendant justify 'by process, &c.; and the plaintiff reply that a *supersedeas* afterwards issued, after which the defendant detained him; it will be bad; for by his replication he does not maintain the wrongful taking, but the detention only. R. Cro. El. 404. Com. Dig. Pleader, F. 6: and see Lutw. 1402.

So, if the replication depart from the declaration, that is, if it contain subsequent matter, which does not maintain or fortify the matter in the declaration, it is bad. Co. Lit. 303 b. 304 a. Com. *Dig. Pleader, F. 7. Thus, if the plaintiff make title in his declaration to the entirety, and in his replication to a moiety only, this is a departure, and the replication is consequently bad. 22 H. 6, 51 a. In replevin for taking the plaintiff's goods and chattels, to wit, one limekiln, the defendant avowed for rent in arrear, and the plaintiff in his plea in bar said that the limekiln was affixed to the freehold; the court held that the plea in bar was a departure from the declaration, and therefore bad. 4 T. R. 504. So, where in an action on an annuity bond, the defendants pleaded that no such memorial as the statute requires was enrolled; the plaintiff re-

plied that there was a memorial inrolled, containing the names of the parties, the consideration, &c.; and the defendants rejoined that the consideration was untruly alleged in such memorial to have been paid to both obligors, for one of them did not receive any part of it; the rejoinder was holden to be a departure from the plea. 4 T. R. 585, affirmed in error, 2 H. Bl. 280. So, where in assumpsit by an executor upon several promises to the testator in his life time, the defendant pleaded the statute of limitations, and the plaintiff replied a subsequent promise to himself; the replication was holden to be a departure and bad. Willes, 27. See Hardr. 41. So, in debt on bond whereby the defendant on such a day acknowledged, &c., the defendant pleaded a subsequent release; it was holden that the plaintiff could not reply that the bond was delivered after the release, for that would be a departure. Dy. 167. Doct. Pl. 121, see also 10 Mod. 311. 1 Str. 22. So if the plaintiff in his declaration claim an estate by the common law, and maintain it in his replication by an act of parliament, it is a departure. Co. Lit. 304 a. Com. Dig. Pleader, F. 8. In trespass for taking cattle, the defendant justified damage feasant, and the plaintiff replied that he impounded them out of the county: the replication was adjudged a departure: for the impounding them out of the county was no cause of action at common law. 3 Lev. 48. So, if the plaintiff entitle himself at common law, and maintain it in his replication by a custom, it is a departure. Co. Lit. 304 a. Unless indeed the custom be alleged merely in maintenance of the declaration, in which case it is otherwise: as, in covenant against an apprentice, if the defendant plead within age, and the plaintiff reply that by the custom of London an infant may bind himself an apprentice, this is no departure. Semb. Cro. El. 653. Semb. cont. 1 Lev. 81. Com. Dig. Pleader, F. 9. So, if the plaintiff entitle himself to an estate by feoffment or the like, he cannot afterwards maintain it in his replication by matter tantamount, as by lease and release, &c. Co. Lit. 304 a. Com. Dig. Pleader, F. 10.

But matter which maintains and fortifies the count, is not a departure: as if the plaintiff declare on a lease, generally, and the defendant plead *nil habet in tenementis*; if the plaintiff reply that the lease was by indenture, it is no departure. 1 Leon. 156. 3 Leon. 203. So, if the plaintiff in his declaration shew a charter for discharge of toll, and the defendant plead a resumption of all liberties by statute; the plaintiff may reply that they are revived by a subsequent statute, and it will be no departure. R. Cro. Car. 257. Yelv. 13. So, in an action for practising as a physician, contrary to the charter, 10 H. 8, confirmed by stat. 14 H. 8; if the defendant plead the stat. 34 H. 8. c. 8, it is no departure in the replication to state that the charter 10 H. 8,

and stat. 14 H. 8, were confirmed by stat. 1 Mary, c. 9, any other statute to the contrary notwithstanding. R. Cro. Car. 256. R. 2 Cro. 127. So, in an action on a statute, if the defendant plead that it was repealed, the plaintiff may say it was revived by another statute; 1 Lev. 87; or if the defendant plead that it expired, the plaintiff may say that by another statute it was made perpetual. Id. If in trespass the defendant justify for a distress damage feasant, the plaintiff may say that he afterwards converted it to his own use; for this shews the taking to have been a trespass *ab initio*. R. 1 Salk. 221. So, in trespass for taking a horse, and the defendant justifies as for an astray; replication that he used it, is no departure, for the same reason. R. 2 Cro. 147. [Where one of two partners was an infant, and the holder of a bill accepted by both partners declared on it as accepted by the adult only, in the names of both, to which the adult pleaded in abatement that the other partner (the infant) ought to have been sued jointly with him; a replication that the other partner was an infant, was holden to be no departure. 4 Taunt. 468. So, where to debt on bond conditioned to perform an award, the defendant pleaded no award; the replication set out an award; the defendant set out the whole award (which recited the submission, and from which it appeared that the award was not warranted by the submission,) and then demurred: this was holden to be no departure from the plea. 11 East, 166. So where bail, sued on a *scire facias* on their recognizance, pleaded that no *ca. sa.* was duly sued out, returned and filed against the principal, according to the custom and practice of the court; to which the plaintiff in reply shewed a *ca. sa.* issued into Middlesex: it was holden to be no departure for the defendants to rejoin that the venue in the action against the principal was in London; for that sustained the plea. 16 East, 39. Also, if the plaintiff, in his replication, vary from his count in any thing not material, it is no departure: [see 2 B. & P. 446:] as in *assumpsit*, if the plaintiff allege a promise twenty years before, and to a plea of the statute of limitations, replies *assumpsit infra sex annos*: it is no departure; for the time of the promise in the declaration was not material. R. 1 Lev. 110. per 3 J. Cro. cont. Cro. Car. 334. [1 Str. 21. 2 Str. 806. Fortesc. 375, and see Cro. El. 168. 1 Salk. 222, 223. 1 L. Raym. 121. 2 Id. 1015. 2 Saund. 5. (n. 3).] So, in an action for a trespass on the 1st May, if the defendant justify the same day, the plaintiff may assign trespass on another day, and it will be no departure; for the day is not material. Per Holt, 1 Salk. 222. 6 Mod. 115. 120. And the same in any personal action, where the time is not material. R. 1 Salk. 222. [But if the day in the declaration be material, as in an action upon a bond, bill of exchange, promissory note, or the like, the plaintiff in his

replication cannot vary from the day, without a departure. 2 Saund. 5. (n. 3.) 10 Mod. 311. 1 Str. 22.] If the declaration allege a promise in such a parish in the ward of Cheap, and the plaintiff afterwards in his replication say that it was at A. beyond the seas, viz. in the parish and ward aforesaid, it is no departure; for the place was immaterial. R. 1 *Leon. 143. 1 Sid. 221, and see 1 Salk. 222. So, if in trespass for an assault at H., the defendant plead *molliter manus imposuit* in removing him off his ground at A., and the plaintiff reply a right of way in the defendant's ground at A., it is no departure; for the place is not material. R. Lutw. 1437. Also, if defendants sever in their pleas, the plaintiff may vary from his count, and it will be no departure: as in an action against six, if one plead not guilty, and the others plead specially the plaintiff may reply to the latter as supposing them only guilty; R. 2 Leon. 199; but otherwise, if one make default or die, or do not sever himself by plea. Id. So, a departure, when it is of necessity, shall not prejudice: as, if a man count of a gift in tail, he may maintain it by a recovery in value in his replication; for he cannot have another count. Co. Lit. 304 a. Com. Dig. Pleader, F. 11.

A departure may be taken advantage of, on a general demurrer; 2 Saund. 84 d. 1 Wils. 122. 2 Id. 96. 4 T. R. 504. Willes, 638. 27; and the note in 1 Saund. 117, to the contrary, is a mistake, which the learned editor of that work elsewhere rectifies. 2 Saund. 84 d. But it is cured by pleading over. T. Raym. 86. 2 Saund. 84 d. See 5 H. 7, 19. 2 B. & P. 446.

See further upon the subject of departure, post, p. 265.

It must be true.] A variance between a replication and the evidence, in the time, place or matter stated, when issue is joined upon it, it is fatal, in the same cases and under the same circumstances, as in the case of a plea. See ante, p. 224, 225. As to the place where &c., or special venue, as it is called, it is never necessary to insert it in a replication, unless the matter stated be clearly local: and therefore, where a replication to *ne unques accouple* alleged a marriage in Scotland, the court held that it was not necessary to add after a *scilicet* a place in England for venue; the venue for the mere purpose of trial, being necessarily the venue laid in the declaration. 2 H. Bl. 145. And now, by Reg. Pl. H. 4 W. 4, l. s. 8, no venue shall be stated in the body of any pleading.

Surplusage.] Surplusage in a replication, shall not vitiate it. The rule is the same as in the case of declarations and pleas. See ante, p. 98. 113. 176. Cro. Jac. 415. Bac. Abr. Pleas, l. 4.

SECT. III.

Defects in Replications, in what Cases aided.

By the Rejoinder.] If the replication be defective in form, it will be aided by the defendant's rejoinder. Co. Lit. 303 b. Doct. Pl. 279. Therefore in all cases where a defect in a replication must be taken advantage of by special demurrer, if the defendant, instead of demurring specially, rejoin, the defect is thereby cured. As for instance, where the replication stated that J. S. sued the plaintiff at law, without saying in what court or in what manner, this was holden to be aided by the rejoinder. 1 Lev. 195. 1 Saund. 117 *(n. 5.) So in debt on bond conditioned to accept a lease on request, the defendant pleaded *non requisivit*, and the plaintiff replied that he tendered a lease, without saying of what lands, and issue was joined on the request; this was holden to aid the defect in the replication. R. Cro. Car. 580. See ante, p. 240. and see Com. Dig. Pleader, M. 8. But if the replication be bad in substance, or shew that the plaintiff has no cause of action, it is not aided by the rejoinder. 1 Lev. 195.

By Verdict, &c.] Replications are aided by verdict at common law, in the same cases and under the same circumstances as pleas and declarations. See ante, p. 241. 163. and see 2 Arch. Pr. C. P. 281. 2 Saund. 319. (n. 6.) As to the cases in which a replication is aided by the statutes of jeofails, see also 2 Arch. Pr. C. P. 281; and as to the cases in which it may be amended, either at common law or under the statute of amendments, see Id. p. 280.

Bad in part, bad for the whole.] A replication, like a plea, if bad in part, is bad for the whole. 1 T. R. 40. 2 Saund. 127. Com. Dig. Pleader, F. 25. ante, p. 241. But this rule does not of course apply, when the objectionable part of the replication may be rejected as surplusage. 3 T. R. 374.

*CHAPTER IV.

THE SUBSEQUENT PLEADINGS.

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- SECT. 1. *Rejoinder.*
 2. *Surrejoinder.*
 3. *Rebutter.*
 4. *Surrebutter.*
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SECT. 1.

The Rejoinder.

1. *The Matter and form of a Rejoinder.*
 2. *Its Requisites.*
 3. *Defects in it, in what cases aided.*
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1. *The Manner and Form of a Rejoinder.*

Where the Replication concludes to the Country.] If the replication conclude to the country, the defendant is thereby precluded from rejoining any new matter, but he must join issue upon the replication. This is done by adding what is termed the *similiter*. If there be but one replication, the *similiter* is added in making up the issue, thus: "and the said defendant doth the like;" or if there be several replications, all concluding to the country, the *similiter* is in that case added in the issue, in a new paragraph, thus: "and the said defendant, as to the said several replications of the said J. N. by him above pleaded, and which the said J. N. hath prayed may be inquired of by the country, doth the like." But if some of several replications conclude to the country, and some with a verification, the defendant in that case pleads the *similiter* to the replications concluding to the country, together with rejoinders to those concluding with a verification, and delivers them in the ordinary way. The form is thus:—

*In the King's Bench, ["Common Pleas,"
or "Exchequer of Pleas."]

The day of 6 William 4.

S. } "And the said defendant, as to the said replication of the said
ats } plaintiff to the said first plea of him the said defendant, and which
N. } the said plaintiff hath prayed may be inquired of by the country,
doth the like."

"And the said defendant, as to the said replication of the said plaintiff to the said second plea of him the said defendant, saith that" [&c., so continuing the rejoinder.] See ante, p. 244.

Where the Replication concludes with a verification.] When the replication concludes with a verification, the rejoinder either traverses, or confesses and avoids it, in precisely the same manner as a replication traverses or confesses and avoids a plea. See ante, p. 244—252, and see 1 Str. 297. Fortesc. 356. It is merely necessary, therefore, in this place, to state the forms of the commencement and conclusion of the rejoinder to such a replication. The forms are thus:—

In the King's Bench, ["Common Pleas,"
or "Exchequer of Pleas."]

The day of 6 William 4.

S. } "And the said defendant, as to the said replication of the said
ats } plaintiff to the said second plea of him the said defendant, saith
N. } that" [&c., stating the matter of the rejoinder; and if it be merely
a general or special traverse of the replication, then conclude to the
country thus:] "And of this he the said defendant puts himself upon
the country, &c." Or, if the rejoinder be a confession and avoidance of
the replication, the conclusion must be with a verification, thus: "And
this he the said J. S. is ready to verify." See ante, p. 252.

The conclusion is to the country or with a verification, in the same cases and under the same circumstances as in a replication. See ante, p. 252. A wrong conclusion, however, either to the country or with a verification, is merely form, and can be taken advantage of by special demurrer only. 4 Ann. c. 16, s. 1. 2 Saund. 190. (n. 5.)

It may be necessary to mention, that where defendants join in their plea, they cannot afterwards sever in their rejoinders. 21 H. 6. 56, 57. Doct. Pl. 122.

Scire facias on a recognizance of bail; plea *no ca. sa.* duly issued, lodged and returned; replication, *ca. sa.* issued and returned *non est inventus*; rejoinder, that it did not lie four days exclusive in the sheriff's office: held, on demurrer, that the rejoinder was bad; for if it were not

a departure, it was bad, as pleading a mere matter of practice, which cannot be done. *Sandon v. Proctor*, 7 B. & C. 800.

Where in trespass for assault and battery against three defendants, all pleaded not guilty, and one pleaded also a justification in defence of his freehold; to this latter plea there was a replication, that the defendant had used more force than was necessary; and the rejoinder was, that all the defendants did not use more force than was necessary: this rejoinder was holden bad on general demurrer, it being a fundamental rule in pleading, that the replication must pursue the plea, and the rejoinder the replication. *Morrow v. Belcher*, 4 B. & C. 704.

2. *The Requisites of a Rejoinder.*

The rejoinder like the replication, must be triable; it must not be double, (see ante, p. 256,) nor will the court give leave to the defendant to plead several rejoinders to the same replication; 2 Str. 908; it must be certain; see ante, p. 257; it must be direct and positive, and not merely by way of recital or argument; see ante, p. 258; it must not be repugnant or insensible; see ante, p. 258; *and lastly, it must be conformable to, and not depart from, the plea in bar. Although departure has been already treated of with reference to replications, (see ante, p. 258,) yet as it is more likely to occur in a rejoinder than in a replication, it may not be unnecessary to treat of it again in this place, with reference to rejoinders.

If the rejoinder depart from the plea, it is bad. Co. Lit. 303 b. A departure is, when the rejoinder sets up a different defence from that stated in the plea;—when it contains matter not pursuant to the plea, and not supporting or fortifying it. Co. Lit. 304 a. Thus, if the defendant in his plea make title to entirety, and in his rejoinder to a moiety only, it is a departure. 22 H. 6. 51 a. So, if the defendant in trespass entitle himself by descent, and the plaintiff reply a feoffment by the defendant himself; if the defendant rejoin that the feoffment was upon condition, and that he entered for condition broken, this is a departure. Plowd. 7 b. Co. Lit. 304 a. So, if a feoffment by A. be pleaded, and the plaintiff reply that A. disseised him and then enfeoffed, and that he re-entered, and the defendant rejoin that after the feoffment the plaintiff released; this is a departure. Plowd. 105 b. So, in trespass, if the defendants justify distraining a hide for a customary payment, and the plaintiff reply that he tanned the hide after the distress, and the defendant rejoin that he tanned it to prevent it from rotting: it is a departure. R. Cro. El. 782. So, if the defendant in covenant plead performance generally, and the plaintiff assign a breach

in not doing such an act, and the defendant rejoin that he offered to do it: this is a departure; for an offer and refusal are not the same as a performance. Co. Lit. 304 a. Cro. Car. 76, 77. [Dy. 371. See also 4 Leon. 79. Dy. 253 b. 2 Mod. 31. 2 Saund. 84. (n. 1.)] So, in an action on a bond to indemnify, if the defendant plead *non damnificatus*, and the plaintiffs by replication shew that they are damaged by maintaining his bastard; a rejoinder that he offered to maintain, is a departure. R. 2 Saund. 84. 1 Sid. 444. So, on a bond to perform covenants, and the covenant was to make a fence as soon as he should cut down the wood, the defendant pleads that he did not cut down any wood, and the plaintiff replies that he cut down two acres and did not make a fence, to which the defendant rejoins that he made a fence: this is a departure. R. Dy. 253 b. [See Fortesc. 341. 1 H. Bl. 253. So, if in bar to an action on a bond conditioned to save the plaintiff harmless, the defendant plead that he did save harmless, and the plaintiff in his replication shew a damnification, to which the defendant rejoins that he had no notice thereof: the rejoinder is a departure. 1 Saund. 117. 1 Lev. 194. and see 1 L. Raym. 233. 1 Wils. 334. 1 Salk. 221, 222. 2 Barnard, 193. So, where in debt on bond for performance of covenants, one of which was to return certain goods, the defendant pleaded performance, the plaintiff in his replication assigned a breach in not returning the goods, to which the defendant rejoined that he had no order to do so: the rejoinder was holden clearly to be a departure. 2 Lev. 67. So, where in debt on an annuity bond, the defendants pleaded that there was no such memorial as the statute required; the plaintiff in his replication alleged that there was a memorial, and shewed the particulars; to which the defendants rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, whereas one of them had not received any part of it: this was holden to be a departure. 4 T. R. 585. 2 H. Bl. 266. So, in debt on bond, conditioned to allow his wife to dispose of 50*l.* out of his personal estate, the defendant pleaded that he had not prevented his wife from doing so; and the plaintiff replied a disposition by the wife, a request to the defendant to pay, and a refusal; to which the defendant rejoined that he had no personal estate out of which he could pay the 50*l.*: this rejoinder was holden to be a departure. *Willer*, 25. So, where in debt on bond, conditioned to execute the office of overseer without the plaintiff's assistance, the defendant pleaded that he did execute it singly without the plaintiff's assistance, and the plaintiff replied that he did not execute it singly, &c.; to which the defendant rejoined that the plaintiff voluntarily took on him the office, and executed it, without the defendant's request: the rejoinder was holden to be

a departure. 2 L. Raym. 1440. See also Comyn's Rep. 553.] So, in debt on bond to perform covenants, if the defendant plead performance, and, a breach being assigned in the replication for non-payment of rent, rejoin that he was expelled: the rejoinder is a departure; R. T. Raym. 22. 1 Sid. 77; or if he rejoin that he has paid so much for rent and so much for taxes, which make up the whole demand for rent, it is a departure. 1 Salk. 221. So, if in debt on bond conditioned to pay all charges to an attorney for such a suit, the defendant plead payment, and the plaintiff reply shewing such a sum remaining unpaid to which the defendant rejoins that he had no bill of it: this is a departure; R. Lutw. 422; or if the defendant rejoin that the plaintiff did not name a place for the payment of it, it is a departure. R. 2 Mod. 31. See 3 Lev. 241. So, in debt on bond to perform an award, if the defendant plead *no such award*, and the plaintiff in his replication shew the award and assign a breach, and the defendant rejoin that the award is bad, R. T. Raym. 94. 1 Sid. 180. R. 2 Rol. 692. l. 40. or that the award was not delivered, R. 2 Saund. 184. 1 Lev. 300, or not made of all controversies: 1 Lev. 127; the rejoinder is a departure. [and see Kailw. 175 a. 39 H. 6. 16. Doct. Pl. 128. 3 Lev. 239. 241. But where the defendant, by way of rejoinder, set forth the whole award, (in which was recited the submission, and it appeared that the award was not warranted by it,) and demurred; it was holden not to be a departure from the plea. 11 East, 188. [If the defendant justify by a deed dated the 1st May, and the rejoinder say that it was *primo deliberat* 9 May, the rejoinder is a departure; R. 3 Lev. 349; and the same, if there be a variance in the date of a bond, between the rejoinder and plea. 1 Salk. 222. In replevin, if the defendant avow for *damage feasant* in his freehold, and the plaintiff plead that he leased to B. for three years, and the defendant reply that B. made a lease to him for part of the term: this is a departure. R. 1 Rol. 387. [So, where in trespass for taking an ox, the defendant pleaded that he took it damage feasant, and the plaintiff replied a right of common, in the *locus in quo*, to which the defendant rejoined that the plaintiff had surcharged the common: the rejoinder was holden to be a departure; 1 Salk. 221; because, as the defendant knew the *plaintiff's right, he should have stated the surcharge as the matter of his defence in his plea. Willes, 636.] If the defendant in his plea prescribe for a park within a forest inclosed *ad voluntatem suam*, and in his rejoinder say it was inclosed so that deer of the forest could not get in, it is a departure. Bridg. 25. If the defendant in his plea say that a certain ship went from London to B. without deviation, and from B. to London, but was lost during the said voyage; and the plaintiff shew a deviation to Jamaica; to which

the defendant rejoins that the ship was compelled to go to Jamaica; the rejoinder is a departure. R. Skin. 345. Com. Dig. Pleader, F. 7. Where, in assumpsit, the defendant pleaded infancy; the plaintiff replied that the goods &c. were necessities; and the defendant rejoined an account stated, *quodque superinde præd. quer. exoneravit* the defendant: it was holden to be a departure. 1 Str. 422. To a *sci fã.* against bail, the defendants pleaded *no ca. sa.* against the principal; replication that there was; to which the defendant rejoined that it had not lain four days in the sheriff's office: the rejoinder was holden to be a departure. 1 Wils. 334. Or if the defendants plead *no ca. sa.* and rejoin *quod erroneus emanavit*, it is a departure. Fortesc. 333. But where to a plea of *no ca. sa.* the plaintiff in reply shewed a writ of *ca. sa.* issued in Middlesex, it was holden to be no departure for the defendants to rejoin that the venue for the action against the principal was in London. 16 East, 39.

So, if the defendant claim an estate by common law in his plea, and maintain it in his rejoinder by an act of parliament, it is a departure. Dy. 10. Doct. Pl. 120. [and see Co. Lit. 304 a. Where, in an action by the sheriff against his bailiff, on a bond conditioned to pay him 20*l.* for each defendant's name in every warrant on mesne process, the defendant pleaded payment; the plaintiff replied that he had not paid it for B.; and the defendant in his rejoinder pleaded the stat. 23 H. 6, and 3 Geo. 1: the rejoinder was holden to be a departure: for in the plea he said he had paid, in the rejoinder that he ought not to pay; the plea was at common law, the rejoinder founded on a statute. Fortesc. 368. So, if a man avow, for that A. being seised in fee granted to him a rent and the plaintiff plead *rien in les tenements* at the time of the grant, and the defendant reply that A. was *cestui que use* in fee, which use is now executed by the statute of uses: this is a departure. Plowd. 105 b. So, in formedon, the tenant pleaded a fine by tenant in tail, the demandant replied *partes finis nihil habuerunt*, to which the tenant rejoined that the tenant in tail was seised of the use; and this was holden to be a departure. Dy. 291. So, if a defendant in trespass plead a lease for fifty years, and the plaintiff reply that the lease was void by a statute; if the rejoinder say that a proviso in the said statute affirmed it for twenty-one years, it is a departure. R. Plowd. 105 b. [Dy. 102 b. 103 a. Doct. Pl. 121.] So, if the defendant justify by a distress for rent, and the plaintiff reply that he used and sold the distress, to which the defendant rejoins that he sold the distress in pursuance of stat. 2 W. & M.: it will be a departure; for it should have been so alleged at first. Semb. Lutw. 1425. Com. Dig. Pleader, F. 8. So, where to

trespass for impounding a mare, the *defendant justified damage feasant; the plaintiff in his replication claimed a right of common in the *locus in quo*; to which the defendant rejoined that the mare was mangy and doing damage: this rejoinder was holden to be a departure; because the plea is that the mare was doing a private trespass, and the rejoinder that the defendant impounded her by virtue of stat. 32 H. 8, c. 13, s. 11, as a nuisance. 2 Wils. 96. See Carth. 306. 1 L. Raym. 29. 4 Mod. 269. 1 Salk. 167. Skin. 574.

So, if the defendant entitle himself by common law, and afterwards maintain it by a custom, it is a departure. Co. Lit. 304 a. As, if he plead a feoffment, and the plaintiff reply within age, and the defendant rejoin that by the custom of the place an infant of the age of fifteen years may make a feoffment: this is a departure; D. 3 Leon. 40. [37 H. 6. 5;] but otherwise in Kent. 1 Lev. 81. Com. Dig. Pleader, F. 9. So, if the defendant entitle himself to an estate, generally, as, by a feoffment in fee, he cannot in his rejoinder maintain it by other matter tantamount, as by lease and release &c. Co. Lit. 304 a. Com. Dig. Pleader F. 10. If a gift in tail be pleaded in bar, the defendant cannot in his rejoinder maintain it by a recovery in value, 3 H. 7. 5, or dying seised. 21 H. 6. 33, and see 39 H. 6. 15, 16, per cur. Doct. Pl. 120, 121. 123.

But matter which fortifies the bar, is not a departure: as, if the tenant in assise plead a feoffment by A., and the demandant reply that A. disseised him, and then enfeoffed the tenant, and that he afterwards re-entered: a rejoinder that the demandant released to A. before his feoffment, is no departure; Co. Lit. 304 a. Plowd. 105 b; but otherwise, if the release were after the feoffment. So, in debt on bond, if the defendant plead performance, and the plaintiff reply that the covenant was to account for all money received, and that he received such a sum; if the defendant rejoin that he was robbed of that sum, it is no departure. R. 1 Vent. 121. 2 Lev. 5. Com. Dig. Pleader, F. 11. So, where in debt on bond conditioned that A. should not run away during his apprenticeship, the defendant pleaded that A. did not run away, and the plaintiff replied that A. was bound for seven years, and ran away before the end of that time: a rejoinder that A. was bound for five years only, is not a departure; it merely explains and fortifies the bar. 2 Wils. 8. So, in debt on bond conditioned to indemnify from tonnage due to A., if the defendant plead *non damnificatus*, and the plaintiff reply that A. distrained for the said tonnage; if the defendant rejoin that nothing was due for tonnage, it is no departure. Fortesc. 341. Bac. Abr. Pleas, L. and see 1 H. Bl. 253. So, where in assumpsit, the de-

defendant pleads a tender before the exhibiting of the bill, and the plaintiff replies a *latitat* sued out before the tender; if the defendant in his rejoinder admit the promise before the exhibiting of the bill, but deny the promise before the issuing of the *latitat*, it is no departure. 1 Wils. 141.

A departure may be taken advantage of by general demurrer; but it is cured by pleading over. Ante, p. 261.

*3. *Defects in a Rejoinder, in what cases aided.*

A rejoinder, if defective, is aided in the same manner and under the same circumstances as a replication, by the plaintiff pleading over, or by verdict, or by the statutes of jeofails. See ante, p. 261. Also a rejoinder, like a replication and plea, if bad in part, is bad for the whole. See ante, p. 262.

SECT. II.

The Surrejoinder.

The surrejoinder is the plaintiff's answer to the defendant's rejoinder; it is governed in every respect by the same rules as the replication. If the rejoinder conclude to the country, the *similiter* is added thus: "And the said plaintiff doth the like;" or if there be several rejoinders, all concluding to the country, the *similiter* is added thus: "And the said plaintiff, as to the said several rejoinders of the said defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like." But if some of several rejoinders conclude to the country, and some with a verification, the plaintiff in that case pleads a *similiter* to the rejoinders concluding to the country, together with surrejoinders to those concluding with a verification, and delivers them in the ordinary way. The form is thus:—

"In the King's Bench, [Common Pleas, or Exchequer of Pleas.]"

The — day of —, 8 Will. 4.

N. } "And the said plaintiff, as to the said rejoinder of the said defend-
agst. } ant to the said replication of him the said plaintiff to the said
S. } first plea of the said defendant, and whereof he hath put himself
upon the country, doth the like."

"And the said plaintiff, as to the said rejoinder of the said defendant to the said replication of him the said plaintiff to the said second plea of the said defendant, saith," [&c., stating the matter of the surrejoinder; and if it be merely a general or special traverse of the rejoinder,

then conclude to the country thus:] "And this be the said plaintiff prays may be inquired of by the country, &c." Or, if the surrejoinder be a confession and avoidance of the rejoinder, the conclusion must be with a verification, thus: "and this be the said plaintiff is ready to verify."

In debt on bond, conditioned for A. B.'s faithfully accounting for all monies received by him as collecting clerk, the defendant pleaded that A. B. did account; replication that A. B. had received divers sums amounting to 2000*l.*, for which he did not account; rejoinder that the sums in the replication mentioned, were three sums of 1000*l.* 500*l.* and 500*l.* received from C., D. and E., and that A. B. had duly accounted for them; surrejoinder, that the sums mentioned in the replication were other and different sums than those mentioned in the rejoinder, and concluding to the country: It was objected on demurrer, that the replication was bad for not stating the particular sums, and the names of the persons from whom they were received; but the court held this to be unnecessary: It was then objected that as the surrejoinder contained new matter, it ought to have concluded with a verification; but the court held that it was in substance but a denial of the rejoinder, and therefore properly concluded to the country. *Calvert v. Gordon*, 7 B. & C. 809.

SECT. III.

The Rebutter.

The rebutter is the defendant's answer to the plaintiff's surrejoinder; it is governed in every respect by the same rules as the rejoinder. See ante, p. 264—265.

SECT. IV.

The Surrebutter.

The surrebutter is the plaintiff's answer to the defendant's rebutter; it is governed in every respect by the same rules as the replication and surrejoinder. See ante, p. 256, *et supra*.

*There may be pleadings subsequent to the surrebutter: those of the defendant are governed by the same rules as the rejoinder; those of the plaintiff, by the same rules as the replication. They seldom however occur in practice.

When the last of the pleadings has concluded to the country, or when issue has been joined on *nul tiel record &c.*, the issue is made up, and the parties proceed to trial.

* CHAPTER V.

NEW ASSIGNMENT.

In what cases.] Where the defendant has committed several trespasses either upon the person, or upon the goods or land of another, some of which are justifiable, others not; and the action is brought for those trespasses which are not justifiable, but the defendant by his plea answers those only which are: the plaintiff should make a new assignment: that is, he should state in his answer to the plea, that the action was brought, not for the trespass justified, but for another, specifying it. 1 Saund. 299 a. (n. 6). 2 Wils. 4. As, if the plaintiff were arrested on a warrant granted previously to the issuing or delivery of the writ, and in an action for an assault and false imprisonment, the defendant justify under the writ; the plaintiff should make a new assignment. Or if the plaintiff were legally arrested at first, but detained after being discharged by the person at whose suit he was in custody; and, in an action for an assault and false imprisonment, the defendant justify under the writ upon which the plaintiff was arrested: the plaintiff should make a new assignment. 1 Saund 299 a. (n. 6). 1 Bing. 317. So, if a man have two causes of action for breach of contract, for one of which he has already obtained a judgment; and to an action for the other the defendant plead the judgment recovered; the plaintiff should new assign, and shew that the action was brought for a different breach of contract from that for which the judgment pleaded had been obtained. So, in all other cases, where the defendant applies his justification to a different cause of action from that to which it is applicable, the plaintiff must make a new assignment. If there be two counts however in the declaration, each comprising the plaintiff's cause of action, and the defendant plead a justification to one only, the plaintiff should not make a new assignment; but it is much better to put the justification in issue, and if the defendant prove it, the plaintiff may then give evidence of his cause of action upon the second count. 1 Saund. 299 a. (n. 6). 1 T. R. 479.

If, instead of doing so, however, he make a new assignment, and fail in the proof of what he has therein alleged, he cannot afterwards have recourse to the second count; unless indeed he have two causes of action independently of the one justified: thus, where a declaration for false imprisonment against A. and B. contained two counts, to both of which the defendants pleaded not guilty, and the first they justified under mesne process, A. as plaintiff in that action, and B. as bailiff; and the plaintiff by a new assignment replied that after the arrest, B., with the consent of A., *voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count: the plaintiff having failed in proving the new assignment, by not shewing the consent of A., was not allowed to prove the same trespass against B., under the second count. 2 T. R. 172. And see 1 Saund. 299 a. (n. 6). So if the justification be false, although there be but one count, the plaintiff should traverse the justification, instead of making a new assignment. Therefore, in trespass for false imprisonment, the defendant having justified under a writ sued out by him as attorney for J. M. against the plaintiff, indorsed for bail for 100*l.*, which was delivered to the sheriff, who by virtue thereof arrested and detained the plaintiff; the plaintiff, instead of traversing the plea, (as he ought to do, the arrest being irregularly made by the sheriff's officer, without a sufficient warrant from the sheriff,) new assigned that the trespass complained of was upon another and different occasion than that stated in the plea, and after the supposed arrest therein mentioned; it was holden that the defendant, on proof of the fact as above stated, was entitled to a verdict. 16 East, 82.

A new assignment is also used to ascertain, with precision and exactness, the place or time, which has been alleged only generally in the declaration. Thus, where a man is possessed of two closes, each called the road, and the defendant has a right of passage over one, but none over the other: if, to an action for going over the close where he has no right, he justify going over that where he has a right, the plaintiff must new assign. So, in other cases where the defendant pleads a right of way, the plaintiff may new assign *extra viam*. So, formerly, where in trespass for breaking and entering the plaintiff's close, the defendant pleaded the common bar *liberum tenementum*; if the close were really the freehold of the plaintiff, he might either traverse the plea, or make a new assignment naming the close and setting out the abutments, at his option. See Ast. Ent. 504. Cro. Jac. 594. 2 Lutw. 1419. 1401. 27 H. 6, 22 b. 11 East, 51. 15 East, 235. 10 East, 73. It was dangerous, however, to traverse the plea; for if the defendant had land in the parish named in the declaration, he would be entitled to a verdict. See 2 Taunt. 154. The plaintiff therefore usually new assigned. In

modern pleading, indeed, the necessity of a new assignment was obviated, by setting out the abutments in the declaration, in which case the defendant could not plead *liberum tenementum*; and this was much the better way of pleading, when it could be done without risk of variance. And, as now, by Reg. Pl. H. 4 W. 4, Il. s. 5, pl. 1, "in actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abutments, or other description, in failure whereof the defendant may demur specially;" a new assignment in such a case will seldom be necessary.

Also if the defendant, professing to answer the whole declaration, justify only part of the trespass &c. for which the action is brought, the plaintiff should make a new assignment as to the residue, and also traverse the justification if he doubt the truth of it. As where the defendant pleaded that the house in the declaration was called C. house, and one of the closes *Blackacre* and the other **Whiteacre*, and that they were his freehold; the plaintiff traversed that C. house and *Blackacre* were the defendants freehold, and new assigned the trespass in 20 acres other than *Whiteacre*; the court held that the plaintiff was right in thus traversing such parts of the plea as justified for places intended by the declaration, and in new assigning as to such part as had mistaken the place intended. Cro. El. 812. So, where an action is brought for fishing in the river T., being the plaintiff's fishery, and the trespass intended by the declaration is for fishing to the extent of two miles and upwards; if the defendant plead that he is seised in fee of ten acres adjoining the river, and prescribe for a free fishery in the river along the side of the ten acres, the plaintiff should not merely traverse the prescription and go to issue upon it, for at the trial he would not be permitted to give evidence of any act of fishing by the defendant either above or below the ten acres, as the question would be confined to the prescription only; but the plaintiff should new assign, and state the trespass complained of was not only for fishing in the river adjoining the ten acres, but also above and below them; for otherwise the defendant, if the prescription were found for him, would succeed in the action, though guilty of almost the whole trespass for which the action was brought. So, where a man claims a right of way which is disputed by the owner of the close, and has committed trespasses in other parts besides those in which he claims the way: if the defendant plead a right of way, the plaintiff must traverse it, and must also state in a new assignment that the defendant committed trespass in other parts of the close. 1 Saund. 300. (n. 6.) But the plaintiff cannot traverse a part of the plea, and also new assign for the same part. Where the plaintiff complained of a single act of trespass in each count, each of which was justified by the

defendant in his several pleas; it was holden that the plaintiff could not in his replication take issue upon the facts of such justification, and also new assign either the same or different matters; such replication and new assignment being double. 10 East, 73.

So, where in actions for breaking and entering the plaintiff's house or land, felling his timber, or taking away his goods, the defendant pleads a licence, which the plaintiff had revoked before any of the trespasses were committed, or which was confined to some particular thing and the defendant exceeded it, the plaintiff must state the revocation or excess in a new assignment. 1 Saund. 300 a. (n.) So where in trespass, a grant of a way, common &c. is pleaded; if the defendant have used the way, common &c. in a different manner from what he is entitled to do under the grant, the plaintiff must new assign. 1 T. R. 560.

There are also some replications, which rather partake of the nature of new assignments, than are properly and strictly so: as where a man abuses an authority or licence which the law gives him, by which he becomes a trespasser *ab initio*; if the defendant plead such licence or authority, the plaintiff must reply the abuse. 8 Co. 146. 3 Wils. 20. 3 T. R. 292. 1 H. Bl. 555. 1 T. R. 338. per Buller. 1 Saund. 300 a. (n.)

**Form of it.*] The commencement of the new assignment is the same as that of a replication. See ante p. 244. The conclusion is with a verification and prayer of judgment, in this form: "*And this he the said plaintiff is ready to verify; wherefore, inasmuch as the said defendant hath not answered the said trespass above newly assigned, he the said plaintiff prays judgment, and his damages by him sustained on occasion of the committing thereof, to be adjudged to him &c.*" So the Precedents referred to in 9 Went. Ind. cxxiv—cxxviii.

Where the plaintiff answers the plea and also new assigns, it is usual to aver in the new assignment that the action was brought as well for the trespass mentioned in the plea, as for the trespass which is newly assigned. But where the plea does not at all meet the place in the declaration, but justifies the trespass in some other place of the same name, or otherwise, upon some legal ground of defence, the plaintiff makes merely a new assignment, without traversing any part of the plea, for that would obviously be repugnant; in which new assignment care must be taken to describe the place with all its abutments by metes and boundaries, so as clearly to distinguish it from the place justified in the plea; Bro. Trespass, 203. Dy. 264. Cro. Jac. 594. Cro. El. 355. 492; and if the plea do not name the place, the new assignment should. If it give the abutments, they must be proved as laid. Semb. Dy. 161 b. The new assignment must also correspond with the declaration: therefore if the

declaration be *quare clausum fregit*, a new assignment in a barn would be bad ; 4 Leon. 16 : although otherwise, if the declaration were *quare domum fregit*. 4 Leon. 16. 2 Leon. 185. A new assignment in two acres of land *sive prati*, has been holden bad for uncertainty. R. Dy. 264 a. Bendl. pl. 222. 1 And. 31. Com. Dig. Pleader, 3 M. 34.

Plea to a new assignment.] The new assignment being in the nature of a declaration, the defendant must plead to it in the same manner as to a declaration : Goldsb. 191. Moor, 540. Cro. El. 589, 590 : he may plead not guilty, or justify ; 14 H. 8, 4 a ; and he may justify for a different cause from that contained in his plea. R. Moor, 540. The defendant however cannot plead to the new assignment, that the place mentioned therein is the same with that in the plea ; but if they really be the same, the defendant should plead not guilty, and the plaintiff will be estopped from giving evidence of any trespass committed in the place to which the justification refers : 14 H. 8, 4. pl. 3. Bro. Trespass, 168. 27 H. 8, 7 pl. 21. Bro. Trespass, 3. Cro. El. 492. R. Dy. 161 b. in marg. R. Moor, 463 ; for the new assignment expressly states the trespass to have been committed in another and different place from that stated in the plea, and is in itself an admission of the justification.

To the defendant's plea the plaintiff replies, and the defendant thereupon rejoins, &c. as in ordinary cases.

Where in assumpsit upon a bill of exchange against the acceptor, the defendant pleaded that he had accepted it for the accomodation of the drawer, &c. ; the plaintiff new assigned, that the bill declared upon was other and different from the one in the plea mentioned ; the defendant pleaded that he had written his acceptance on blank paper for the drawer to draw a bill thereon at nine months date, and that, instead of doing so, the drawer had drawn a bill at six months, &c. ; replication, that the bill mentioned in the plea was not that newly assigned, and concluding to the country : held, that as the replication admitted the existence of the bill mentioned in the plea to the new assignment, it ought to have concluded with a verification. *Heydon v. Thompson*, 1 Ad. & E. 210. See *Calvert v. Gordon*, *supra*.

Where in trespass, the defendant pleads the general issue and a special plea, and the plaintiff joins issue on the one, and traverses the other, and also new assigns ; if the defendant allow judgment *to go by default as to the new assignment, and withdraw the general issue, and the plaintiff after that take the cause down for trial, and there be a verdict for the defendant on the special plea, the defendant will be entitled to the costs of the cause, although the plaintiff have damages assessed for him on the new assignment. *Cross v. Johnson*, 9 B. & C. 613. But if, instead of doing this, the defendant allow the general issue to stand,

so as to force the plaintiff to try the cause, the plaintiff will be entitled to the costs of the cause. *Broadbent v. Shaw*, 2 B. & Ad. 940. *House v. The Thames Commissioners*, 3 Brod. & Bing. 117. *Vickers v. Gallimore*, 5 Bing. 196. *Longden v. Bourne*, 1 B. & C. 278. *Forrester v. Dale*, 1 Dowl. 412. Or if the plaintiff in such a case, when the general issue is withdrawn, instead of proceeding to trial on the issue on the special plea, enter a *nolle prosequi* as to so much of his declaration as is covered by it, and execute a writ of inquiry as to the new assignment, he will be entitled only to the costs of a common inquiry. *Ruddock v. Smith*, 1 Dowl. 467.

*CHAPTER VI.

PLEAS TO THE JURISDICTION.

It is a general rule, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged. 1 Saund. 74. Bac. Abr. Pleas, E. 1.

In transitory actions, the courts of Westminster have jurisdiction, unless the plaintiff by his declaration shew that the action accrued within a county palatine, &c. 12 Co. 114. 1 Sid. 103. Bac. Abr. Courts, D. 3. Pleas, E. 1. But in local actions, inferior courts frequently have exclusive jurisdiction; and this distinction is to be observed as to their modes of claiming it: namely, that as to the principal courts of that description, within the jurisdiction of which *brevia domini regis non currunt*, such as the courts of the counties palatine, and of the cinque ports, if their jurisdiction be intrenched upon by the superior courts, the defendant in the action may plead to the jurisdiction; 4 Inst. 224. Bac. Abr. *ubi supra*; but in the case of a franchise, either by letters-patent or prescription, of holding pleas within a particular jurisdiction, if a suit properly determinable in this inferior court, be commenced in any of the courts at Westminster, the defendant cannot plead to the

jurisdiction of the superior court, but the owner of the franchise must claim consuance. 1 Rol. Abr. 480, 490. See Bac. Abr. *ubi supra*.

So, if a man be impleaded in an inferior court, for a matter not within its jurisdiction, he may plead to the jurisdiction. 2 Inst. 220, 230. See 6 T. R. 245. 4 Bur. 2108. 1 Went. 60.

It may be necessary to observe, that a plea to the jurisdiction is the first in the regular order of pleading; that is, it cannot be pleaded after a plea in abatement or a plea in bar has been determined: for, by pleading in abatement or in bar, the defendant admits the jurisdiction of the court; and having once admitted it he shall not afterwards be allowed to deny it. 35 H. 6. 12. 22 H. 6. 18, 19. Co. Lit. 303 a. As to the order of pleading, to be observed by a defendant, in pleading to the jurisdiction, in abatement and in bar, see the beginning of the next chapter.

Having made these few general observations on the subject, we shall now treat of it more particularly, in the following sections.

SECT. 1. *In what cases a Defendant may plead to the Jurisdiction.*

2. *Form of the Plea.*

***SECT. 1.**

In what Cases a Defendant may Plead to the Jurisdiction.

Ancient Demesne.] Tenant in ancient demesne ought not to be sued or compelled to appear in any court out of the manor. 2 Inst. 543. 4 Inst. 269. And therefore in all actions, where a recovery against tenant in ancient demesne makes the land frank free, ancient demesne is a good plea. 1 Rol. 322. l. 19, 20. [8 H. 6. 35.] 4 Inst. 270. So, in actions where the interest of the land is bound, or the realty by intentment may come in debate, ancient demesne is a good plea: as in ejectment; Per 2 J. Warb. cont. Oro. El. 826. R. 5 Co. 105. Hob. 47. 4 Inst. 270. Adm. 1 Salk. 185. [Doct. Pl. 51. Bac. Abr. Anc. Dem. D.]; in replevin; 5 Co. 105 a. Hob. 47. 4 Inst. 270. 21 E. 4. 3 a. R. 46 E. 8. 1, 2. [Godb. 64. 1 Bulst. 108. Owen. 28.]; in partition, though the land be not directly demanded: R. 1 Rol. 322. l. 45. R. T. Raym. 249; in account against a guardian in socage or bailiff; 5 Co. 105 a. Hob. 47. 4 Inst. 270; and the like. So, in an action by the lord himself against his tenant, ancient demesne is a good plea. Qu. 1 Rol. 322. l. 50. Semb. F. N. B. 12 E. Com. Dig. Anc. Dem. F. 5. See the Precedents, 1 Went. 51.

But it cannot be pleaded by lessee for years, 1 Rol. 323. l. 40. 4 Inst. 270, or by a copyholder of the manor; R. 3 Lev. 405. R. 1 Salk. 186; [for it must appear that the party has a freehold interest. 2 Bur. 1046.] So, it is no plea in trespass, though the land may come in debate; for the court of ancient demesne cannot hold plea of any thing *contra pacem* or *vis et armis*, 1 Rol. 322. l. 47. 56. 323. l. 30. 5 Co. 105 a. Hob. 47. Dub. Latch. 83, 84. Acc. 4 Inst. 270. 46 E. 3. 1. [Cro. El. 826. Bunb. 132.] So, it is no plea in detinue of charters; 1 Rol. 323. l. 3: or in *quare impedit*, 1 Rol. 323. l. 15. [7 H. 6, 35,] for the court of ancient demesne cannot write to the bishop; Hob. 48; or in an action on stat. 5 R. 2; Hob. 47. R. 21 E. 4, 3 a. [2 H. 7, 17;] or in debt in C. B., for damages recovered in ancient demesne; [or in debt on lease. 5 Co. 105. 1 Rol. Abr. 322.] So, ancient demesne is no plea, where the manor and the demesnes thereof are demanded; [for in that case the lord would be judge in his own cause. F. N. B. 11. 2 Leon. 191. 1 Salk. 56. Comb. 188. 1 Show. 271.] So, if there be an action against the lord and others, the others cannot plead ancient demesne. 1 Rol. 323. l. 45. 41 E. 3, 32. Com. Dig. Anc. Dem. F. 6.

The issue, whether land is ancient demesne or not, shall be tried by the book of Domesday. 9 Co. 31 a. 1 Salk. 57. [Dy. 150. Hob. 186.] If it be not under the title *de terra regis* there, it is not ancient demesne. 1 Salk. 57. Also Domesday book should prove the very land to be ancient demesne, as alleged in the plea; for if issue be upon the manor of B. in the county of N. and Domesday book mention the manor of B. in the county of L. it is not sufficient. R. Hob. 188. But if the question be merely whether the land be parcel of a manor in ancient demesne, it shall be tried by the country. 9 Co. 31 a. 1 Salk. 57.

**Counties Palatine.*] If a man be impleaded in the courts at Westminster for land in the county palatine of Lancaster or Durham, he may plead to the jurisdiction; 4 Inst. 212. Rob. Ent. 1. Bro. V. M. 473. [and see the Precedents. 1 Went. 49. 69.] But this is no plea, if the action be against the judge there; 4 Inst. 212. Th. D. l. 11, c. 10, s. 1. 1 Rol. 374. l. 5. 4 Inst. 213; or when the king is a party, because he can implead in his own court: Th. D. l. 11, c. 10, s. 2; or when the defendant lives out of the county palatine, so as not to be amendable to the process of the courts there. R. 4 Inst. 213. Com. Dig. Abatement, D. 2. And this was formerly the case, also, as to lands lying in the county palatine of Chester; but now, by stat. 11 G. 4 & 1 W. 4, c. 70, s. 13, 14, the Court of Sessions and Court of Exchequer of Chester are abolished, and the jurisdiction of the Courts of

Common Pleas, King's Bench and Exchequer extended to the county palatine of Chester, in as full a manner, for every purpose, as it is exercised in any English county.

So, in personal actions, the defendant may plead that the cause of action accrued within a county palatine, if it appear so by the declaration: 4 Inst. 213. See Th. D. l. 11, c. 10, s. 4, 5. 5 Mod. 335; and he should aver that he is commorant there, and his lands within the county whereby he may be summoned. 5 Mod. 144. Carth. 355. But where a transitory matter is alleged in the declaration to have arisen in another county, the defendant cannot plead to the jurisdiction, stating that it arose within a county palatine. R. 4 Inst. 213. Com. Dig. Abatement, D. 2.

The Cinque Ports, &c.] If the cause of action arise within the Cinque Ports, and the defendant be impleaded elsewhere, he may plead to the jurisdiction: Moor. 276. Th. D. l. 11, c. 10, s. 6, 7, 8. Hut. 74. and see Off. Brev. 178; except in cases where the king is a party, Cro. El. 911, for he may sue in what court he pleases; 12 Co. 61; except also in ejectment for lands within the Cinque Ports, if the demise be alleged *dehors*; 1 Sid. 66; and except in trespass or other transitory action, where the defendant is not commorant within the Cinque Ports. Yelv. 12. 2 Inst. 557. The privilege of the Cinque Ports in this respect extends to actions real, personal and mixed. 4 Inst. 224; and, though the land escheat to the king, the privilege remains. Id. So, if part of the land demanded lie within the Cinque Ports, and part without, and the defendant plead to the jurisdiction, the whole writ abates. Id. Also, a tenant or defendant may plead to the jurisdiction of the court, that the land lies in Ireland or out of the realm. R. 1 Show. 191. 1 Salk. 80. [Qu. see 6 East. 583, post. 280.] Com. Dig. Abatement, D. 3. See 1 Went. 45. 49. 68. 51. 69. 78, 79.

Privilege as a Baron of the Cinque Ports.] The defendant may plead that he is a baron of the Cinque Ports, and, by letters-patent of Edw. I., confirmed by Queen Elizabeth, ought to be impleaded there, and not elsewhere. Off. Br. 178. Com. Dig. Abatement, D. 5.

Privilege as a Tinner.] The defendant may plead that he is a tinner and that Edw. I., granted to the tanners of Cornwall to be *sued* in the Stannary court, and not elsewhere, upon contracts arising within the liberty, and that this contract arose there. R. Moor, 849. 1 Rol. 295. R. 2. Rol. 44. But the defendant must shew the patent, for he is privy to it. R. Moor, 849. Dub. 1 Rol. 296. This, however, is no plea, where the defendant is in custody of the marshal. R. 2 Bulst. 122, 123. Com. Dig. Abatement, D. 7.

Privilege as a Minter.] The defendant may plead that he is *moneta* [*279]

rius, and; by letters-patent of Edw. II: ought to be impleaded before the warden of the mint, and not elsewhere. Tho: Ent. 3 Com. Dig. Abatement, D. 8.

Privilege as Officer of a Court.] If an attorney of the Common Pleas be impleaded in the King's Bench or *vice versa*, if he would have advantage of his privilege, he must plead it to the jurisdiction; R. 2 Bulst. 207. Lutw. 195. 639. 1666. Tho. Ent. 4. Off. Br. 177. Bro. V. M. 496; for it shall not be allowed upon motion, without plea. R. 2 Salk. 544. If he plead it, he may produce his writ of privilege or admission upon record, and conclude *prout patet per recordum*, and then the plaintiff cannot deny that he is an attorney; R. 2 Salk. 545. Skin. 582; or he may plead his privilege, without producing his writ, &c., and then it may be denied. R. 2 Salk. 545, and see Skin. 582. 521. Com. Dig. Abatement, D. 6.

So, if any other officers of the King's Bench or Common Pleas, such as the warden of the Fleet, 1 Salk. 1. the filacer, 2 Salk. 544. Tho. Ent. 4, the prothonotary or any of his clerks, 1 Str. 546. 2 Str. 705. Fortesc. 341, 342, or the like, be impleaded in any other court than that of which they are officers, they may plead their privilege. So, if a clerk in the Exchequer be impleaded in the King's Bench or Common Pleas, he may plead his privilege. Lutw. 44. R. 6 Mod. 305, and see Andr. 44. Lutw. 46. Style, 359. W. Jon. 288. 2 Salk. 546. Bro. Privilege, 25. Dy. 328. 3 Leon. 223. Tho. Ent. 3. Hardr. 365. So, if one of the six clerks or of the sixty clerks in Chancery be impleaded in any of the other courts, it seems he may plead his privilege. 20 H. 6, 32 b. 1 Vent. 264. Bro. V. M. 498. See Tho. Ent. 3. 3 H. 6, 30 a. So, if a serjeant at law be sued in any other than the courts at Westminster, he may plead to the jurisdiction. R. 2 Lev. 129. 2 Mod. 297, and see 2 Str. 738. Barnes, 371. Com. Dig. Abatement, D. 6.

But if an attorney or other officer, be sued *in auter droit*, as executor or administrator, R. Hob. 177. R. 1 Salk. 2. 7, or be sued jointly with others who are not privileged, 20 H. 6, 32 b. 33 a. Per 2 J. 1 Vent. 298. 1 Ver. 246. Bro. Priv. 7. 9. 12, even jointly with his wife. R. 1 Rol. 580. l. 45. Bro. Privilege, 9, he cannot plead his privilege. So, if an attorney or officer of C. B. commence an action there against an attorney or officer of B. R., &c., or *vice versa*, R. 2 Brownl. 207. R. 4 Leon. 193. Hardr. 117. 365. Godb. 81, or if an attorney of B. R. be sued in a real action in C. B. 1 Saund. 67, the defendant cannot plead his privilege. He may plead his privilege, however, in a *qui tam* action, as well as in any other. 2 Salk. 543. Com. Dig. Abatement, D. 6. See the Precedents. 1 Went. 1. 5. 29. 38. 48.

*It is right to observe, however, that it is doubted whether the sta-

tute for the uniformity of process (2 W. 4, c. 39, s. 1. 21.) has not virtually abolished this privilege of attorneys and officers: I think it has not: it has certainly abolished their privilege of suing by attachment of privilege, and of being sued by bill; but I see nothing in it which at all affects their right of being sued in the court of which they are attorneys or officers.

SECT. II.

The Form of a Plea to the Jurisdiction.

Commencement.] A plea to the jurisdiction is pleaded in person and not by attorney; for pleading by attorney, presupposes the leave of the court to his appointment, and such leave would be deemed an acknowledgment of the jurisdiction. Bac. Abr. Abatement, A. Pleas, E. 2. 6 Mod. 146, and see 1 Lutw. 7. To this, however, there is one exception, namely, the plea of ancient demesne in ejectment, which may be pleaded by attorney; 2 Bur. 1046; and the precedents in general are so; see Rast. 58 b. Rob. Ent. 1. Cliff, 17 pl. 44. 1 Went. 51; for the defendant in that case must obtain leave to plead such plea, and it will be presumed that the court at the same time gave him leave to appear and plead by attorney.

The following is the usual form of the commencement of a plea to the jurisdiction:—

“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]

The — day of — 6th William 4.”

S. } “And the said S. in person, says that the court ought not to take
ats } cognizance of the plea aforesaid; because he says that,” &c. then
N. } stating the matter of the plea.

Statement.] In a plea to the jurisdiction, the defendant must show that another court has exclusive jurisdiction of the cause of action. 2 H. 7. 16, 17. Doct. Pt. 234. 1 Show. 192. 6 East, 563. And the court alleged to have jurisdiction, must be in England; for if a court in Ireland or elsewhere out of England, have exclusive jurisdiction of the action, the defendant should plead that matter in bar, or avail himself of the objection in evidence under the general issue. 6 East, 563. See Cowp. 172. 1 Ver. 203. 2 Ver. 357.

A plea of ancient demesne should state that the land is ancient demesne: for it is not sufficient to say that it is parcel of the manor of D., which is ancient demesne. R. 1 Salk. 56. It should say *de antiquo dominio*; for *de dominio regis* would be bad. Semb. Dy. 373 b. It

should also state that the land is holden of such a manor; for it is not sufficient to say that it is *de antiquo dominico* generally, without shewing of what manor it is holden. Semb. 2 Leon. 190. See Lev. Ent. 195. Winch. Ent. 551. It may state that the land is impleadable either *in cur' manerii coram ballivis et sectatoribus ejusdem manerii*, or, *in cur' manerii per parvum breve de recto clauso*, or, *in curia manerii* generally. Lutw. 713. [See Dy. 373 a. 36 H. 6. 21. Hob. 47.] It is not necessary, however, to state that the land is holden in socage, for that shall be intended. 2 Leon. 190. Com. Dig. Abatement, D. 1.

*Where the plea is that the cause of action arose within a county palatine, it must aver that the defendant is commorant there, and has lands in the county whereby he may be summoned. 5 Mod. 144. Carth. 355, and see 4 Inst. 218, ante, p. 278.

In a plea of privilege, if the defendant plead *quod est attornatus*, without saying *quod fuit tempore brevis*, it is bad. R. 1 Salk. 1. 2 Str. 864. 2 L. Raym. 1567. So, if he plead *quod omnes attorn' non debent placitari*, &c., without saying *vel eorum aliquis*, it is bad; R. Lutw. 639. Hardr. 164. Style; 359; for it is a negative pregnant. Fortesc. 343. So, *quod nullus attorn' non debet*, was holden bad: R. 1 Salk. 328. The custom or prescription to have privilege, need not, however, be very precisely alleged, for the court will take notice of it; 2 Lutw. 1606; it is matter of law not traversable. R. 2 Salk. 543. Com. Dig. Abatement, D. 6. It is not necessary to lay a special venue to the facts stated in a plea of privilege, for it shall be tried where the writ is brought. 2 L. Raym. 1172, 1173. 2 Salk. 545. See Carth. 363. 1 Vent. 264. Lutw. 1466. semb. cont.

See the different precedents of pleas to the jurisdiction, above referred to; and see 1 Went. Index.

Conclusion.] The conclusion of a plea to the jurisdiction, is thus: "and this, he the said J. S. is ready to verify; wherefore he prays judgment, if the said court of our lord the king, now here, will or ought to take cognizance of the plea aforesaid, &c." The plea of privilege by an attorney, is in some precedents concluded thus: "and this he the said J. S. is ready to verify; wherefore he prays judgment, if he ought to be compelled to answer to the said plea here in court, &c." See 1 Went. 49. 38. 29; but the conclusion either way, it should seem, would be good. See 5 Mod. 145, 146. Carth. 363. 1 Salk. 298. 36 H. 6, 18.

Affidavit.] Pleas to the jurisdiction, like all other dilatory pleas, must be verified by affidavit; 4 Ann. c. 16. s. 11. see Say. 293. 19. 2 Str. 738. 1 Arch. Pr. C. P. 303, 304; otherwise the plaintiff may treat the plea as a nullity and sign judgment, Carth. 402. 1 Str. 225. 639. 2

L. Raym. 1409. 1 T. R. 277: 689. 5 T. R. 210. 7 T. R. 298. and see 4 East, 348, or he may move to set it aside. 1 Str. 638. Say. 19. 293. 3 Bur. 1617, and see 1 Arch. Pr. C. P. 304. The affidavit is in general merely that "the plea hereunto annexed is true in substance and fact." See Fortesc. 342. 341. 2 Str. 705. 2 Bur. 1046.

Replication.] When the defendant has pleaded to the jurisdiction, the plaintiff may either demur to it, or reply to it, by traversing or confessing and avoiding it; or he may enter a *cassetur billa vel breve*, as directed 2 Arch. Pr. C. P. 241. The form of the replication is thus: "and the said plaintiff saith, that notwithstanding any thing by the said defendant above in pleading alleged, this court ought not to be precluded from taking cognizance of the action aforesaid; because he saith that" [*&c.* stating the matter of the replication:] "and this he the said plaintiff prayeth may be inquired of by the country, *&c.*" Or, if it conclude with a verification, then thus: "and this he the said *plaintiff is ready to verify; wherefore he prays judgment, and that the said defendant may answer to the said declaration of him the said plaintiff, *&c.*" Where a plea of privilege, however, concludes by praying judgment if the defendant ought to be compelled to answer, the commencement of the replication, instead of being in the form above mentioned, is thus: "and the said plaintiff saith that the said defendant, notwithstanding any thing by him the said defendant in his said plea alleged, ought to answer to the said declaration of the said plaintiff in the court here; because he saith that," *&c.*

To the plea of ancient demesne, the plaintiff may reply that the land is pleadable at common law, and traverse that the manor is ancient demesne; Rast. Ent. 58 b. Show. 271; or he may plead it without a traverse. See Tho. Ent. 2. Or he may reply that it is copyhold, parcel of the manor. 2 Cro. 559. Or he may traverse that the land in question is parcel of the manor. R. Show. 271. But he cannot reply that it is pleadable at common law, and traverse that it is parcel *de antiquo dominico*. R. Show. 271. Com. Dig. Abatement, D. 1.

*CHAPTER VII.

PLEA IN ABATEMENT.

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- SECT. 1. *In what Cases.*
 2. *Form of the Plea.*
 3. *Replication to it.*
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SECT. I.—*Plea in Abatement, in what Cases.*

THE following is the order the defendant must observe in his pleading:—

- I. Plea to the Jurisdiction. Co. Lit. 303 a.
- II. Plea in Abatement.
 1. To the person of the Plaintiff. Co. Lit. 303 a.
 2. To the person of the Defendant. Co. Lit. 303 a.
 3. To the Count. Co. Lit. 303 a. Th. D. l. 10. c. 1, s. 5.
 4. To the Writ, for Matter appearing upon the face of it. Co. Lit. 303 a. 3 E. 3, 30. 30 E. 3, 20.
 5. To the Writ, for matter Dehors. 3 E. 3, 30.
 6. To the Writ, for matter *Ex Post Facto*.
- III. Plea in Bar of the Action. Co. Lit. 303 a. Com. Dig. Abatement, C.

Pleading a plea in any one of these classes, is deemed an acknowledgment that you have no ground for pleading a plea in any of the preceding classes, and a waiver of your right to do so. Therefore, after a plea pleaded by the defendant has been determined against him, and judgment of *respondeas ouster* given, he cannot plead a plea in the same or in any preceding degree or class with that which he has already pleaded; but he may plead one in any of the subsequent classes he pleases. Thus, after pleading to the jurisdiction, he may plead in abatement or in bar; after pleading in abatement, he may plead in bar, but not to the jurisdiction; after pleading in abatement to the count, he may plead in abatement to the writ, but not to the person; and the like. See 30 E. 3, 20.

*We have already treated of pleas to the jurisdiction, and pleas in bar; we shall now treat of pleas in abatement, in the order above mentioned.

1. *Pleas in Abatement, to the Person of the Plaintiff.*

Outlawry.] We have already seen (ante, p. 3.) in what cases a man, who is outlawed, is disabled from bringing or maintaining an action. And it is not necessary that the outlawry should be at the suit of the defendant; if the plaintiff be outlawed in any suit whatever, he is thereby disabled to sue. Co. Lit. 128 b. In an action by husband and wife, it is a good plea that the wife was waived. So, if a woman be demandant or plaintiff, that she is waived is a good plea. Lutw. 39. So, outlawry is a good plea in an information *qui tum*, &c., although the plaintiff sue partly for the king; R. 2 Mod. 267; and in an *audita querela*, though the suit be by way of discharge merely. R. 2 Cro. 425. And the outlawry of one demandant, is a plea to both; [2 H. 7, 8. Doct. Pl. 64;] unless he be outlawed for felony, for that is a severance in law. So, in personal actions, outlawry of one plaintiff, is a plea to both. But in error, attain, *audita querela*, &c., which are by way of discharge merely, the outlawry of one plaintiff cannot be pleaded in disability of the others. R. 2 Cro. 616. Com. Dig. Abatement, E. 2.

Outlawry may be pleaded in bar, if the cause of action be forfeited as in debt, detain, &c., Co. Lit. 128 b. 3 Lev. 29, in assumpsit for a debt, Bac. Abr. Outlawry, D. 3, or in *scire facias* upon a judgment in trespass, by which the damages are ascertained; R. per 3 J. W. Jon. 239; but not in real actions; nor in personal actions where the damages are uncertain, as in trespass to land, or for a battery, or the like. Do. Lit. 128 b. R. Ow. 22. and see 33 H. 6, 19. Doct. Pl. 397. 395. In all these cases, however, it may be pleaded in abatement; Bac. Abr. Outlawry, D. 3; for it may be pleaded in abatement, even when pleadable in bar; Lutw. 1604; or it may be pleaded in bar to part, and in abatement to another part; Lutw. 1513: and even it is said that it may be pleaded in bar, after it has been pleaded in abatement. 10 H. 7, 11. Lutw. 1604. Bac. Abr. Abatement, N. See the Precedents, Thomp. 8, 9. Clift. 14. pl. 32. 1 Went. Index. When pleaded in abatement, the plaintiff shall not reply that the outlawry is erroneous; for it is good till reversed. Lutw. 36 40. See 1 Leon. 87. But if the plaintiff, after the plea of outlawry, and before judgment, reverse the outlawry, or obtain a pardon, his writ shall not abate, but the action shall proceed. 44 E. 3, 27 a. Co. Lit. 128 b. Doct. Pl. 397. Bac. Abr. Outlawry, D. 3. See Doct. Pl. 9.

In pleading outlawry, it is necessary either to aver that the plaintiff and the party outlawed are one and the same person, or that it other-

wise appear on the face of the plea. Lutw. 40. 2 Mod. 267. The plea must conclude with a *prout patet per recordum*. R. 3 Lev. 29.

Attainder.] The defendant may plead that the plaintiff is attainted of treason or felony. Co. Lit. 180 a. Noy, 1. 1 Show. 155, or *attainted in a *præmunire*, Co. Lit. 129 b., or hath abjured; Id. 128 a; and if the cause of action be forfeited by the attainder, it may be pleaded in bar. Bro. V. M. 252. [See 2 Barn. & Ald. 258.] But if the attainder were pardoned, Adm. 1 Show. 155. Com. Dig. Abatement, E. 3. See the Precedents, 1 Went. 75, and Index, or were pardoned conditionally, and the condition performed, Semb. See 6 Geo. 4, c. 25, s. 1; 7 & 8 Geo. 4, c. 28, s. 18, or, in the case of an attainder for a felony not capital, if the party have undergone the punishment adjudged for his offence, Semb. See 9 G. 4, c. 32, s. 3, before the cause of action accrued, it cannot be pleaded either in bar or in abatement.

Alienness.] That the demandant or plaintiff is an alien enemy, may be pleaded by the tenant or defendant, in all actions real, personal, or mixed, either in abatement, Co. Lit. 129 b. Ast. Ent. 11. 9 E. 4, 7; or in bar to the action. Co. Lit. 129 b., even although the plaintiff sue in *auter droit* as executor, &c. R. Cro. El. 142. [See Owen, 45. Bac. Abr. Alien, D.] So, in an action on a bond by an executor, the defendant may plead that the testator was an alien enemy; Semb. Lutw. 34. Skin. 370; but it should appear that he was so at the time of his death. R. Skin. 370. Com. Dig. Abatement, E. 4. See ante, p. 3. Doct. Pl. 8, 9. Bro. Denizen, 10. Bac. Abr. Alien D. Andr. 76. 2 Str. 1082.

So, if an alien amy bring an action real or mixed, the tenant or defendant may plead *alienness* in abatement. Co. Lit. 129 b. [An alien amy, however, may extend lands upon a statute merchant or staple, and maintain an assise, &c. in case of ouster. 11 E. 3. rot. 87. Dy. 2 b. in marg.] But *alienness* is no plea in a personal action brought by an alien amy: Co. Lit. 129 b.: such as trespass, 32 H. 6, 23 b., debt, action on the case for slander, &c.; R. Dy. 2 b; nor can it be pleaded to a *scire facias* on a judgment. R. 1 Salk. 2. [2. L. Raym. 853.] or to a writ of error; 1 Brownl. 42. Co. Lit. 129 b.; nor can it be pleaded, where an alien amy sues in *auter droit* as executor or administrator. R. Cro. Car. 9. Skin. 370. [Cro. El. 683.] Com. Dig. Abatement, E. 4. See ante p. 3.

If the action be by an alien amy, *alienness* must be pleaded in abatement; if by an alien enemy, it may be pleaded either in abatement or in bar. Cro. Denizen, 3. 10. Rast. 252. 605. Co. Lit. 129 a, b. 7 Co. 1. 32 H. 6, 23. Doct. Pl. 8. See Show. 349. 4 Mod. 405. 8 T. R. 166. and see the Precedents, 1 Went. 7. 42. 51. and Index.

The plaintiff may reply, that he was born within the ligeance of the

king. Co. Lit. 129 b. 7 Co. 1, 26. 6 Co. 47. 1 Leon. 78, 79. Carter, 50. Rast. 605. 252. Herne, 361. Ast. 11. and see Carth. 302. 265, stating the place where; 1 Sid. 357. Carth. 302; or that he is residing in this country, by the licence and under the protection of the king; 1 Salk. 46. Fortesc. 221. 1 L. Raym. 282, and see the Precedents, 1 Went. 7. 42. 52. 61. and Index; or that he is made denizen by letters-patent, 9 E. 4, 7 b, or naturalized by parliament. 3 H. 6, 55 a. When *alienne* is pleaded in abatement, and the plaintiff replies that he was born within ligeance, the replication may conclude to the country, or with a verification; but if pleaded in bar, the replication must conclude to the country; and this is the *reason of the two precedents in Rastal. Per Holt. Fortesc. 222. Comb. 394. and see Id. 302. 265. but see 1 Salk. 2. 4 Mod. 285.

Infancy.] Formerly if an infant sued by attorney instead of by guardian, it was error, even although judgment were given for him. Cro. Jac. 4. 1 Ro. Abr. 287. pl. 3. Cro. El. 424. This is now aided after verdict, by stat. 21 Jac. 1, c. 13, s. 2, and after judgment by confession or default, by 4 Ann. c. 16, s. 2; but it may still be pleaded in abatement. 2 Saund. 212. 212 a. (n. 5.) See the Precedents, 1 Went. 58. 62. But where one of several executors, plaintiffs, is an infant, it is no objection that he sues by attorney; for such of the executors as are of age, may appoint the attorney for themselves and for the infant. 1 Rol. Abr. 288 pl. 3 Cro. El. 378. 2 Saund. 213. (n. 6.) 2 Str. 783. 2 Arch. Pr. C. P. 145.

Coverture.] The defendant may plead in abatement, that the plaintiff is a feme covert. Co. Lit. 132 b. Anst. Ent. 9. [and see the Precedent, 1 Went. 47. Where trespass for an injury to the property of the wife *dum sola*, was brought by the wife alone, the court held that the defendant, if he would take advantage of the coverture, should have pleaded it in abatement, and not in bar. 3 T. R. 627. So, if a feme sole plaintiff marry, after the commencement of the action, the defendant may plead the coverture in abatement; 6 T. R. 265; the rule, as laid down in the old books, being that where the plaintiff is covert at the time of the writ purchased, the writ is abated *de facto*, but coverture afterwards makes the writ abateable only. 32 H. 6, 11. Co. Ent. 173. Rast. 108. 161. 126. 107. Doct. Pl. 3. 1 Sid. 410. 1 Leon. 168, 169. See 2 L. Raym. 1525. 2 Str. 811. Barnard, K. B. 70. 2 Rol. Rep. 23. Semb. Cont. But if a feme sole marry, after verdict and before the day in bank, the defendant cannot plead this coverture, for he has no day given him to do so; but the plaintiff shall have judgment. Cro. Car. 132. 1 Bulst. 5. Ante, p. 42.] Coverture, however, is no plea, if the husband be banished, Co. Lit. 132 b.

R. Moor, 851. 2 H. 4. 7 a, or have adjudged, Co. Lit. 132 b. 133 a. or, if there be a divorce *a mensa et thoro* only. D. Moor, 666. So, it is no plea, if the queen consort sue alone. Co. Lit. 133 a. To a plea of coverture, the plaintiff may reply that she is sole, and traverse the coverture: and the issue shall be tried by the country. Ast. Ent. 9, 10. Com. Dig. Abatement, E. 6.

So, the defendant may plead that the plaintiff is his own wife. Semb. 17 E. 3, 20 b. 1 Brown. Ent. 63. So, in an action by husband and wife, it may be pleaded that she was not covert at the day of the writ purchased, Th. D. l. 11. c. 2. s. 8. [Fitz. Brief. 476.] or that they never were married, 1 Show. 50, or that they were divorced, and therefore she is not his wife; 39 E. 3, 32; [but no advantage shall be had of this objection, on the general issue. 1 Str 480.] Com. Dig. Abatement, E. 6. and see generally upon this subject, ante, p. 37—42.

Excommunication.] Formerly the defendant might plead the abatement that the plaintiff was excommunicated; see ante, p. 4; but this can no longer be done, as excommunication is not now attended with any civil incapacity. 53 Geo. 3, c. 127, s. 3.

**Nonjoinder.*] Parceners, we have seen, (ante, p. 47, 48,) must join in all actions brought by them, for any cause of action relative to their lands; otherwise the defendant may plead the nonjoinder in abatement. See ante, p. 54. And if the tenant say that the land is departable by custom among the heirs male, and that the demandant has a brother not named; it is sufficient, without saying among whom the land was parted. See Th. D. l. 11, c. 26, s. 1. 3 E. 3. 101. 9 E. 3. 467. So, if the tenant shew that the land is gavel-kind, and descended to the demandant and R. his brother, it is sufficient, without saying that R. is alive; for if R. had issue, the issue ought to join; and if he died without issue, the demandant ought to make title to R.'s moiety. Th. D. l. 11, c. 26, s. 2. 24 E. 3. 25. Com. Dig. Abatement, E. 8.

So if one joint-tenant sue alone, the defendant may plead in abatement that the plaintiff has nothing except jointly with such a one. Th. D. l. 11, c. 27, s. 5. [See ante, p. 48, and see the Precedents, 1 Went. 52. 67. 78. Com. Dig. Abatement, E. 9.

In what cases tenants in common shall sue jointly, in what not. See ante, p. 48. If they do not join in actions in which they should sue jointly, the defendant may plead the non-joinder in abatement. See ante, p. 54.

Where there are two or more joint-contractors, or two or more persons who have received a joint injury, and are jointly interested in the thing which was the subject of the injury, if one of them sue alone, the

defendant may plead the nonjoinder in abatement. See ante, p. 49—53. 54. So, if one of several partners sue alone, the defendant may plead the nonjoinder in abatement. See ante, p. 52. 54.

So, in an action by executors, if all the executors who have proved the will do not join, the defendant may crave oyer of the probate, and plead the nonjoinder in abatement. Ante, p. 53, 55, and see the Precedent, 1 Went. 19. And the same as to administrators. Ante, p. 53. So, assignees of a bankrupt must join in actions for debts due to the bankrupt, &c.; ante, p. 53; otherwise the defendant may plead the nonjoinder in abatement. See ante, p. 54. As to nonjoinder of baron and feme, see ante, p. 37—42.

Misjoinder.] If persons join as plaintiffs in an action, who should not, the defendant may plead the misjoinder in abatement. Ante, p. 55. If a wife join in an action with her husband, where her husband should sue alone, the defendant may plead this misjoinder in abatement. See ante, p. 42. 55. As nonjoinder, however, is matter of nonsuit, it is much more usual to make it the subject of objection at the trial.

No such Person in rerum natura.] The defendant may plead to the person of the plaintiff, that there never was any such person *in rerum natura*; Bro. Brief. 25. Th. D. l. 11, c. 7. Ast. Ent. 10; or that there never was such a person *in rerum natura* as one of the plaintiffs. And, no such person *in rerum natura* as to one, abates the writ as to all. R. 27 H. 8. 26 b. But, that there was no such *person at the day of the writ purchased, is ill; for it should have been pleaded that he was dead before the writ purchased, or that there never was such a person *in rerum natura*. Bro. Brief. 25. 70. 21 E. 4. [6.] Com. Dig. Abatement, E. 16, and see 18 E. 4, 4.

Death of plaintiff.] If the plaintiff died before the writ purchased, the defendant may plead that matter in abatement. Ast. Ent. 8. See Reg. pl. 293. Dub. 2 Vent. 196. Com. Dig. Abatement, E. 17. See Doct. Pl. 3. So, if there be several persons named as plaintiffs in the writ, and one of them were dead at the time of the writ purchased, this may be pleaded in abatement; because it falsifies the writ, the right being then in the survivors only. 20 H. 6. 30. 18 E. 4. 1. 2 H. 7. 16. Brownl. 3, 4. Clift. Ent. 6. Rast. Ent. 126. 1 Went. 50. As to the death of a plaintiff *pendente lite*, see post.

Misnomer of Plaintiff.] Formerly, misnomer in the Christian or first name of a plaintiff, or in his surname or name of dignity, might be pleaded in abatement. See Com. Dig. Abatement, E. 18—22. But now, by stat. 3 & 4 W. 4, c. 42, s. 11, "no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would but for this act have been by law pleadable

in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

Formerly, also, if such name were omitted, such omission was pleadable in abatement; but this would now, probably, be deemed to come within the meaning of the word "misnomer" in the above section.

2. *Pleas in Abatement to the Person of the Defendant.*

Coverture.] If the defendant be a married woman, and be sued without her husband, she may plead her coverture in abatement; Reg. pl. 290. Lutw. 23. [and see the Precedents, 1 Went. 31. 42. 57. and Index:] even although her husband live out of the realm; Per Lit. 18 E. 4, 4; or although she have given a bail bond, for if she be covert it is not her deed; R. 1 Salk. 7. 6 Mod. 311: or although the action were originally commenced in an inferior court, when the defendant was sole, and removed after coverture; for the proceeding in the superior court in that case is *de novo*. 1 Salk. 8. [but see Barnes, 355. contr.] So, she may plead that she is wife to the plaintiff. Th. D. l. 11, c. 2, s. 7. 12 E. 3. 481. A wife, however, may be sued alone without her husband, if the husband be in exile, Co. Lit. 132 b. Th. D. l. 4, c. 4, s. 1, or hath abjured the realm, see Co. Lit. 133 a. Th. D. l. 4, c. 4, s. 2, or be an alien enemy, and out of the realm. R. 1 Salk. 116. To the plea of coverture, the plaintiff may reply that the defendant was not covert; *Cl. Ass. 15; [or that her husband is in exile, &c. as above mentioned.] Com. Dig. Abatement, F. 2. See 1 Went. 41, & Index; and see upon this subject generally, ante, p. 57, 58.

Also, if an action be brought against a woman as a feme covert the defendant may say that she is sole. Th. D. l. 11, c. 2, s. 5. So, in an action against husband and wife, they may plead that they were divorced before the writ purchased; Cro. El. 352; and if it be shewn that there was a divorce, it shall be presumed to have continuance. Id. But if they plead that J. S. and B. *uxor ejus* were divorced, it is bad; for the record then admits them to be husband and wife. R. Cro. El. 352. Com. Dig. Abatement, F. 2.

Nonjoinder.] If one of several parceners be sued alone, for any matter relating to the property in coparcenary, she may plead that there is another co-heir not named. See ante, p. 65, and Com. Dig.

Abatement, F. 4, 9. To which the plaintiff may reply, that partition has been made between them. Th. D. l. 5, c. 1, s. 2.

So, if a joint-tenant be sued alone, he may plead that he holds jointly with such a one, who is alive and not named. See ante, p. 65, and Com. Dig. Abatement, F. 5. So, he may plead joint-tenancy of parcel. Ast. Ent. 10. and see Th. D. l. 11, c. 29. 2 Leon. 102. Dal. 75. 106. 45 Ass. pl. 13. And if two only of three or more joint-tenants be sued, one of them may plead the nonjoinder, though the other will not. 9 Ass. pl. 8. In pleading joint-tenancy, it is necessary to shew of what gift. M. 19 H. 6, 32. T. 19 H. 6, 78. Agr. 21 E. 4, 78. Dy. 32 a, and that the joint-tenant not named is alive. 29 E. 3. 60. Th. D. l. 11, c. 28, s. 28. In reply to this plea of joint-tenancy, the plaintiff may say that the defendant is sole tenant, and traverse the joint-tenancy. Ast. Ent. 393. and see Co. Ent. 413. Or he may reply that he himself was seised, until disseised by A., who enfeoffed the tenant and another, and that then the plaintiff re-entered and was disseised by the tenant alone. Th. D. l. 11, c. 28, s. 46. 48. 22 H. 6, 50. Com. Dig. Abatement, F. 5.

In what cases tenants in common must be jointly sued, see ante, p. 65. Where the defendant pleads that he holds in common with such a one not named, he must shew how they hold in common. 3 H. 6. 56 b. Com. Dig. Abatement, F. 6.

In actions upon contracts, if the plaintiff do not sue all the contracting parties the defendant may plead the nonjoinder in abatement. See ante, p. 66—69. and see 4 M. & S. 475. 1 B. & Ad. 398. The plea must state that the other person not joined is alive, Lutw. 696. Semb. 1 Saund. 291. 1 Sid. 238. 1 Vent. 34. R. Cro. El. 544. Doct. pl. 294. 28 H. 6, 3. a. pl. 11. Bro. Brief, pl. 27, and, in debt on bond, &c., that he also sealed the deed. 28 H. 6, 3 a, pl. 11. 1 Saund. 291. R. Cro. El. 356. 1 Vent. 34, 136. See the Precedents, 1 Went. 16, 17, 27, 28, 33, 43, 44. 47. 57. 59. 65. 68.

Where husband and wife must be sued jointly, (see ante, p. 57, 58,) if one of them be sued alone, the nonjoinder may be pleaded in abatement. See ante, p. 58. 69. Ast. Ent. 10.

An action against executors must be brought against all those who proved the will; otherwise the defendant may plead the nonjoinder in abatement. Ante, p. 69. It is not necessary, however, *in the plea, to say that the will is proved; 2 H. 5. 8 b. R. 9 Co. 37 b; but it must state that the executor not named administered goods and chattels of the testator. Ante, p. 70. See the Precedents, 1 Went. 58. 13. So, an action against administrators must be brought against all those to whom administration was granted; otherwise the nonjoinder may be

pleaded in abatement; see ante, p. 69. and see the Precedents, 1 Went, 56; to which the plaintiff may reply, that administration was granted at first to the defendant alone. Rast. Ent. 324. Com. Dig. Abatement, F. 10.

By 3 & 4 W. 4, c. 42, s. 8, "no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea." See *DeManton v. Saunders*, 1 B. & Ad. 398.

And by s. 9, "to any plea in abatement in any court of law, of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors."

And by s. 10, "in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiffs, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person; provided that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."

As to the form of the declaration, where the plaintiff discontinues the first action and brings another against the parties, see ante, p. 71.

Misjoinder.] In a real action, if brought against several persons, they may plead several tenancy, that is, that they hold severally and not jointly; see Com. Dig. Abatement, F. 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ. *Id.*

F. 13. But misjoinder in personal actions is not the subject of a plea in abatement. See ante, p. 71.

Death of a Defendant.] A defendant may plead in abatement, that a person who was made co-defendant with him, died before the writ purchased; 27 H. 8, 26 b. Reg. Pl. 293. [18 E. 4, 1. 2 H. 7, 16: 4 E. 4, 33 a. 20 H. 6, 30. Rast. Ent. 126. 611. Doct. Pl. 4. and this even in actions, in which the death of one defendant pending the action is no abatement, as for instance in trespass; for the writ was always false. Bro. Brief, 175, 301. Th. D. l. 11, c. 7, s. 1, 2. 4, 5. And the death of one defendant, before the writ purchased, abates the whole writ. 27 H. 8, 26 b. Com. Dig. Abatement, E. 17. See the Precedent, 1 Went. 74. and Index. As to the death of a defendant pending the writ, Vide post.

No such person in rerum natura.] So, in an action against two or more, one may plead in abatement, that there never was such a person in *rerum natura* as A., who is named defendant with him. Per Vavours, 21 E. 4, 6. Bendl. pl. 196 Th. D. l. 11, c. 7. 27 H. 8. 26 b. Com. Dig. Abatement, E. 16. Per Hussey, 22 E. 4. 45 a. 21 H. 7, 31. 35 H. 6, 50. Dy. 348, 349. Doct. Pl. 265.

Misnomer of Defendant.] Formerly a misnomer of a defendant in his Christian or first name, or in his surname or name of dignity, might be pleaded in abatement. This however can now no longer be done, the plea of misnomer being abolished altogether by stat. 3 & 4 W. 4, c. 42, s. 11, as already stated, ante, p. 288; all the defendant can now do in such a case, is, to apply to a judge at chambers to have the declaration amended, and that the plaintiff shall pay the costs. Id.

3. Pleas in Abatement to the Count.

Pleas in abatement to the count, are either for insufficiency of the count itself, or for variance between it and the writ. As to those for variance, however, they cannot now be pleaded: see 1 B. & P. 645; it was always necessary to obtainoyer of the writ, previously to pleading them; 2 Wils. 85. 395. 2 Salk. 658; and the courts will no longer grant suchoyer. 2 Arch. Pr. C. P. 219. See as to these pleas for variance, Com. Dig. Abatement, G. 8. Bac. Abr. Abatement, H. 1. But as to pleas in abatement for insufficiency of the count, we shall now treat of them; although we shall see that other modes of taking advantage of the defects to which they refer, are much more usually adopted in practice, than the plea in abatement.

Distinct causes of Action.] So it may be pleaded in abatement, that the plaint is of two several and distinct causes of action; Reg. pl. 282;

or of two trespasses, depending upon separate and distinct titles; Reg. pl. 283; or that the assise or other real action, is of the seisin or death of two ancestors; Th. D. l. 10, c. 14, s. 11; or that an ejectment of ward, and trespass, are joined in one writ. Th. D. l. 10, c. 15, s. 1. Com. Dig. Abatement, G. 4, and see 1 Went. 71. At present, however, if a count contain two distinct causes of action, the defendant demurs specially for that cause, instead of pleading in abatement; see ante, p. 97; or if the declaration contain counts which cannot be joined, the defendant may demur generally, move *in arrest of judgment, or bring a writ of error; but it is never at present made the subject of a plea in abatement. See ante, p. 162.

Mistake in the Form of Action.] So, the defendant may plead in abatement that the plaint is not in the proper form of action: as, that the plaintiff declared in an action on the case, when he should have sued in an action of account; Reg. pl. 283; or that he brought an action on the case, instead of an action of trespass. Th. D. l. 10, c. 27, s. 3. But in assumpsit for money had and received to the plaintiff's use, the defendant cannot plead in abatement that he received it as bailiff. R. 1 Show. 71. Com. Dig. Abatement, G. 5. See the Precedents, 1 Went. 71. This however is never at present made the subject of a plea in abatement; but the defendant may take advantage of it at the trial, or, if the mistake appear upon the face of the declaration, he may demur generally, move in arrest of judgment, or bring a writ of error. Ante, p. 20.

Default of Legal Form.] The defendant may also plead in abatement, that the count does not pursue the legal form: as, formerly, in *formedon* &c. that no esplees were alleged; Bro. Count. 7; in prohibition, that it is not alleged that the writ of prohibition was delivered to the defendant, although such allegation, if made, would not be traversable. Bro. Count. 11. Com. Dig. Abatement, G. 7. This however is at present always made the subject of a special demurrer, and not of a plea in abatement.

Upon a plea in abatement to the count, the judgment is *quod quer' nil capiat per breve*. Bro. Count. 8. 12. 24. 60. 64. 74.

4. Pleas in Abatement to the Writ, for matter appearing on the face of it.

Formerly the defendant might plead in abatement of the writ, for any defect appearing in the words, form or substance of it; Th. D. l. 10, c. 2; such as for rasure or interlineation, see Com. Dig. Abatement, H. 1, false Latin, Id. H. 2, the omission of a material word, Id. H. 3, the

addition of a material word, where it should not be, Id. H. 4, want of certainty, Id. H. 5, repugnancy, Id. H. 6, variance between the writ and record, specially, &c. Id. H. 7. 9, 10, variance between the writ and another writ to which it has relation, Id. H. 8, or for a word or sentence being misplaced, Id. H. 11, or for want of form, Id. H. 12, or want of venue, Id. H. 13, want of teste, Id. H. 14, or for a bad conclusion, Id. H. 16, or for a bad return, Id. H. 15; in all these cases the defendant might plead in abatement of the writ. But it was absolutely necessary, before he could thus plead, that he should obtain oyer of the writ; Th. D. l. 10, c. 2, s. 1, see ante, p. 291; and as the courts will no longer grant such oyer, ante, p. 291, it follows that pleas in abatement to the writ, for any defect &c. appearing on the face of it, cannot now be pleaded.

; 5. *Pleas in Abatement to the Writ, for Matter Dehors.*

That the land lies in another county, &c.] The tenant may *plead in abatement to the writ that the land demanded lies in another county; or that parcel of it lies in another county. 26 E. 3, 68. [14.] Th. D. l. 11, c. 3, s. 1. 3. And this plea goes to the whole writ. Per Wilby, 26 E. 3. 68. [14.] Th. D. l. 11, c. 8, s. 3. [As this however is matter of objection at the trial, see ante, p. 80, it is never at present pleaded in abatement.] So, by stat. 6 Rich. 2, c. 2, if, in actions upon contracts, it appear by the declaration that the contract was made in a different county from that in which the venue is laid, the writ shall abate. [This however is never made the subject of a plea in abatement; but the defendant may have advantage of it by general demurrer, or perhaps by motion in arrest of judgment or writ of error.] Com. Dig. Abatement, H. 17.

In *quare impedit* of the church of A., the defendant may plead in abatement, that there is no such church in that county; 45 E. 3. 6. Th. D. l. 11, c. 20, s. 3; or that what the plaintiff calls a church is a chapel annexed to the church; Th. D. l. 11, c. 20; or that the church supposed collegiate, is not so, but parochial. Th. D. l. 11, c. 20, s. 4. But if the church of St. Martin in B., and the church of St. Peter in B., be united, the *quare impedit* (if brought) shall be for the church of B., without saying St. Martin or St. Peter; for there is no longer any church there but the church of B. R. Dy. 259 b. In replevin, also, it may be pleaded that the taking was in another place. Th. D. l. 11, c. 21. Com. Dig. Abatement, H. 22.

Another Action pending.] If the plaintiff commenced his action whilst another writ was pending for the same cause, either in the

same court or in another (R. 5 Co. 62 a.) the defendant may plead this matter in abatement. See 1 B. & Ad. 459. Thus, in assumpsit for fees, the defendant may plead another action pending in B. R. for the same cause; Lev. Ent. 25. Lutw. 33; so in debt on bond, another action pending in the same court upon the same bond. Lev. Ent. 54. So, in trespass for a horse or other thing certain, the defendant may plead that another action of trespass is pending for the same thing; see 5 Co. 61 b.; or that replevin or detinue is pending for the same goods, &c.; 14 H. 7. 12 b. [8 H. 6, 27. Doct. Pl. 10, see 2 Wils. 87;] or in replevin, that trespass is pending for the same taking; see Th. D. l. 11, c. 39, s. 32; or in trover in the Exchequer for a certain quantity of cotton, that another action of trover is pending in B. R. for the same goods; R. 5 Co. 61, Sparry; or in trespass, that an appeal of mayhem is pending for the same battery. Th. D. l. 11, c. 39, s. 36. So, in *quare impedit*, the defendant may plead another *quare impedit* pending for the same avoidance, Hob. 137, although it be for a different disturbance; R. Hob. 137. 1 Brownl. 163; so in assise of *darrein presentment*, that a *quare impedit* is pending against the defendants for the same avoidance. R. Hob. 184. Moor, 863. Hut. 3. So in dower, the defendant may plead that another writ of dower is pending against him for the same tenements. Th. D. l. 11, c. 39, s. 2, 11. [and see 3 H. 7 3. 4 E. 3. 8. 40 E. 3. 31. Doct. Pl. 10, 11.] So, in an information *qui tam*, it may be pleaded that another information is pending for the same cause. Adm. Hob. 128. And if two *informations be exhibited, on the same day for the same cause, the pendency of one may be pleaded to the other, reciprocally; for neither of them having precedence, judgment shall be given for neither, Per Cur. Hob. 128, and according to the case in Moor, 864, 865, the defendant shall not be obliged to answer to either. So, if there be two replevins by two different persons for the same taking, the defendant shall answer neither. R. Moor, 864, 865. In *quare impedit*, the defendants pleaded another *quare impedit* pending for the same presentment, against some of them; and it was holden a good plea. R. Hob. 137. But in trespass against three, it was holden no plea, to say that there was another action pending against two of them for the same cause. R. Lutw. 42. Dub. 1 Show. 75. Cont. per 3 J. Holt dub. Carth. 96. So, in debt on a bond by two, it is no plea that the bond was to three, who have an action pending on it; for it cannot be the same bond. Cro. El. 202. So, it is no plea that another action is pending against a stranger for the same cause: See Hob. 137, 138: as, that another writ depends against others, as executors of the same testator; 3 H. 6. 14. Th. D. l. 11, c. 39, s. 46; or another *quare impedit* against other defendants for the same avoid.

ance. 1 Brownl. 161. [Yet in *quare impedit*, it is a good plea that another *quare impedit*, brought by the present defendant against the present plaintiff is pending; and the same of a writ of partition; because the plaintiff may have the same remedy as defendant in the former action, as he can as plaintiff in this. Bac. Abr. Abatement, M.] It is no plea however against the king, that another action is pending for the same cause; but the first action shall be discharged. Th. D. l. 11, c. 39, s. 19. So, if a writ of a higher nature be purchased, pending an action of an inferior nature for the same land, the second writ shall not abate, but the first. 8 H. 6. 38. [37.] 9 H. 6. 51. 22 H. 6. 40. Th. D. l. 11, c. 39, s. 50. So, in any case, if the other writ be pending in an inferior court, it cannot be pleaded; as, if it be pending in one of the courts of London, Norwich &c., R. 5 Co. 62 a. Th. D. l. 11, c. 39, s. 40. 47, or in the Court of Admiralty, R. Fitzg. 313, 314. [See Dy. 92, 93, or if it be a replevin pending in the county court. 2 Wils. 87:] So, if the other writ so pending, be such as does not state the cause of action with certainty, its pendency cannot be pleaded until after plaint or declaration put upon record, reducing the generality of the writ to a certainty, *unde constare potest* that it is for the same cause of action: as in assise, the defendant could not plead that the plaintiff had another assise pending for the same tenements, until after plaint filed, shewing for what tenements he complained. 5 Co. 61 b., Sparry. Th. D. l. 11, c. 39, s. 14. So, in a writ of entry in nature of an assise; R. Dal. 4; so, in rescous; 5 Co. 61 b.; so in trespass; Id. Th. D. l. 11, c. 31, s. 53; so, in forgery of false deeds. 5 Co. 61 b. Com. Dig. Abatement, H. 24.

It must appear clearly from the plea, that the cause of action in both suits is the same: therefore an assise for lands in one county, was holden not to abate an assise in another; for these could not be the same lands. 4 H. 6, 24. Doct Pl. 10. So an action pending on a bond against three, shall not abate a writ on a bond against two; for it cannot be the same bond. Cro. El. 202. And where *the two actions are of a different form, as for instance trover and detinue, the plea must aver that the cause of action is the same in both. See Freem. 401. It must appear also that the action pleaded as pending, was commenced previously to that to which it is pleaded. 3 Bur. 1423. 1 W. Bl. 437. 2 Lev. 141. 2 Str. 1169. It is not necessary, however, it seems, to say that the action is still pending; for the second writ is abated, even although the plaintiff should have been nonsuit on the first; but it is sufficient to shew that it was pending at the time of the commencement of the second action. 6 Co. Ferrer's case, Doct. Pl. 11. Bac. Abr.

Abatement, M. See the precedents, 1 Went. 8. 37. 44. 52. 59. 64. and Index.

In *qui tam* actions this plea may be either in abatement or in bar; 8 Bur. 1423. and see Say. 216; in all other cases, in abatement only.

Mistake of title &c.] There are other pleas also which the defendant or tenant may plead in abatement; such as *darrein seisin*, or that the person last seised was a different ancestor than is stated in the count; See Com. Dig. Abatement, H. 25: *darrein presentment*, or (in *quare impedit*) that the last presentment was by another ancestor of the tenant or by himself; Id. H. 26; that there is a mistake in the descent or pedigree stated; Id. H. 27; that there is a mistake in the demise stated; Id. H. 28; that the demandant sues in an action of a higher nature than his estate warrants; Id. H. 29; or that the demandant has mistaken the entry supposed to have been made by the tenant. Id. H. 30. But as in these cases the defects are in general the subject of nonsuit at the trial, and as these pleas never occur in modern pleading, it is thought sufficient merely to notice them thus generally, and to refer to Comyn's Digest for any further information on the subject.

Mistake of Property.] In replevin, the defendant may plead in abatement, that the property of the goods taken is not in the plaintiff; Th. D. l. 11, c. 46, s. 1. Reg. pl. 292. [20 H. 6, 18;] or, in replevin by two, that the property is in one only: Th. D. l. 11, c. 46, s. 2. 8. 2 E. 4, 23; or that the property of part is in one alone, and the property of the other part in the other alone; 10 E. 4, 4. 2 R. 3, 15 b. Th. D. l. 11, c. 46, s. 9; or, in replevin by husband and wife, that the property is in the husband alone. Ast. Ent. 6. But it is sufficient, if the plaintiff had a special property, though the general property were in another: as if the cattle taken were levant and couchant upon this land; Th. D. l. 11, c. 46, s. 3; or if the goods taken were in his ward or custody; 27 E. 3, 12. Th. D. l. 11, c. 46, s. 3; or if they were the cattle of his villain. Th. D. l. 11, c. 46 s. 4. 6. Property in another, however, is no plea in trespass, 27 H. 8, 21. 20 H. 6, 19. Th. D. l. 11, c. 46, s. 6. [2 R. 3, 6, nor in any other possessory action in which the right of property does not come in question. Doct. Pl. 264.] Com. Dig. Abatement, H. 31. See the Precedents, 1 Went. 49. 74. and Index.

*6. *Pleas in Abatement to the Writ, for matter Ex Post Facto.*

Death of the Plaintiff.] If the demandant or plaintiff have died since the last continuance, this matter may be pleaded in abatement of the writ. Reg. pl. 293. Ast. Ent. 8. [See 2 Wils. 83. and see the Precedent, 1 Went. 74. and Index.] And the same, if the husband die, in an

action by husband and wife ; for they are but one person in law. *Cro. Car.* 509. [See *Hardw.* 359.] So, in *qui tam* actions, if the informer die, the suit abates ; *R.* 2 *Bulst.* 134 ; yet the attorney-general may in that case still proceed in the action on behalf of the king. *Cro. El.* 583. See *Moor*, 541. But an information does not abate by the death of the attorney-general ; 2 *Bulst.* 261 ; nor by the death of a relator, who informs for the king. 2 *Bulst.* 134. 262. *Hardr.* 161. So, an action by a mayor and commonalty does not abate by the death of the mayor ; *Th. D. l.* 12, c. 1, s. 15. *Cont.* 1 *Salk.* 398 ; nor an action by a dean and chapter, by the death of the dean, if another dean be chosen before the day in court, and the first dean were not named by his name of baptism. *Th. D. l.* 12, c. 1, s. 15. [So, the death of the lessor of plaintiff in ejectment, though he were merely tenant for life, does not abate the suit. 2 *Str.* 1056.] In cases, however, where the plaintiff's death before verdict would be pleadable in abatement ; if it happen after verdict and before the day in bank, it may be made the subject of a motion in arrest of judgment, *Cro. Car.* 509. *Cont.* per *Berkley*, March, 65. *Acc.* 1 *Sid.* 143, or the court at their discretion may put the defendant to his writ of error. *R.* 1 *Salk.* 2. [See 1 *Arch. Pr. C. P.* 239.] But by stat. 17 *Car.* 2, c. 8, s. 1, in all actions real, personal or mixed, the death of either party between verdict and judgment, shall not be alleged for error, so as such judgment be entered within two terms after such verdict. See *T. Raym.* 210. 1 *Lev.* 278. [1 *Wils.* 302. 2 *Arch. Pr. C. P.* 82. 309. And the same, where the death happens after interlocutory and before final judgment, if the action be such as might originally be prosecuted by the executor &c. of the plaintiff. 8 & 9 *W.* 3, c. 11, s. 6. See 2 *Arch. Pr. C. P.* 82.] So, at common law, if the plaintiff die after the day in bank, the suit does not abate ; but judgment shall be entered in the same manner as if he were living. 1 *Vent.* 59. 90. 1 *Sid.* 462. *Com. Dig.* Abatement, H. 32.

So, in all real actions, the death of one of the demandants or plaintiff's since the last continuance, may be pleaded in abatement ; see *Bendl. Pl.* 74 : even although he have previously been summoned and severed ; 10 *Co.* 134 a. [*Co. Lit.* 139.] So, generally, in all actions, the death of one of several plaintiffs since the last continuance, may be pleaded in abatement. *R.* 2 *Lev.* 82. *Carth.* 193. *R. Moor*, 9. 17. There is one material exception to this rule, however, which has been made by stat. 8 & 9 *W.* 3, c. 11, s. 7 ; namely, that if, upon the death of one of several plaintiffs, the cause of action survive to the others, the action shall not abate ; but the death being suggested on the roll, the survivors may proceed in the action. [See 2 *Arch. Pr. C. P.* 303. *So in a *qui tam* action, if the informer die, the attorney-general may proceed

for the king's moiety. R. Moor, 541. See Cro. El. 583. So, where the effect of the writ is not to charge the defendant but to discharge the plaintiffs, as in an *audita querela* for instance, the death of one of the plaintiffs will not abate the writ. 10 Co. 135 a. Yelv. 209. 2 Cro. 19. Com. Dig. Abatement, H. 33. But the stat. 8 & 9 W. 3, c. 11, s. 7, above-mentioned, extends, it should seem, to cases only where the plaintiff dies pending the writ, and not to cases where one of several persons named as plaintiffs in a writ, was dead at the time the writ was sued out; and in this latter case, the death was pleadable in abatement at common law. Ante, p. 288.

Death of the Defendant.] In like manner, the death of the tenant or defendant, since the last continuance, may be pleaded in abatement. So death, after garnishment in detinue, abates the writ. 21 H. 6, 39. [35.] Th. D. l. 12, c. 2, s. 37. So, the death of the defendant at any time before the assizes, abates the writ. R. 1 Salk. 8. Com. Dig. Abatement, H. 34. But if the death happen between verdict and judgment, it shall not be alleged for error, so as the judgment be entered within two terms after such verdict; 17 C. 2, c. 8, s. 1; or if the defendant die after the first day of the assizes or sittings, though before the trial, it is within the remedy of the statute, 1 Salk. 8. 2 L. Raym. 1415. 7 T. R. 32 n. 31, for the assizes or sittings are but one day in law. See 2 Arch. Pr. C. P. 82. So, if the defendant die after interlocutory and before final judgment, the action shall not abate, if it be such as might originally be prosecuted against the executor; but the plaintiff shall have a *scire facias* against the executor &c., and thereupon proceed to execute a writ of inquiry, and sign final judgment. 8 & 9 W. 3, c. 11, s. 6. See 2 Arch. Pr. C. P. 82. The death of the defendant, after final judgment, is of course no abatement of the writ. See 2 Arch. Pr. C. P. 80.

So, if there be two or more tenants or defendants, the death of one of them will abate the suit: see Bro. Brief, 295. 400: as in a writ of right of advowson against parceners or joint-tenants; R. Cro. Car. 574, 583, 585, 589. Hurd. 113. W. Jon. 452; or the like. See Bro. Brief. 295. 50 E. 3, 7 b. 40 E. 3, 26 b. Th. D. l. 12, c. 2, s. 30. R. 1 Leon. 44. Adm. Plowd. 186 b. Bro. Brief, 234. But by stat. 8 & 9 W. 3, c. 11, s. 7, were there are two or more defendants, if one or more of them die, and the cause of action survive against the survivors, the action shall not thereby be abated; but such death being suggested upon the record, the action shall proceed against the survivors. [See 2 Arch. Pr. C. P. 302. 306, 309.] So, in actions founded on a tort, the death of one defendant does not abate the suit; 23 Ass. pl. 10. Th. D. l. 12, c. 2, s. 4. Dy. 175 a. Cro. Car. 574; as in trespass, Bro.

Brief, 80. R. Yelv. 209. R. 2 Lev. 82. R. Cro. El. 145. Th. D. l. 12, c. 2, s. 38, though the defendants be charged jointly; 2 Cro. 19; so, in ejectment; R. Moor, 460. Th. D. l. 12, c. 2, s. 27; so, in trespass against husband and wife, if the husband die; Dub. Cro. Car. 500. Semb. cont. Th. D. l. 12, c. 2, s. 10, 17; *so, in ejectment against husband and wife, if the husband die; for it is in the nature of trespass, and the judgment shall be entered against the wife alone; R. 2 Cro. 356. Hardr. 161; so, in trover; D. 3 Mod. 249; so, in conspiracy; Bro. Brief, 380. Qu. Th. D. l. 12, c. 2, s. 27. 44 E. 3, 22; so, in disceit to reverse a fine of lands in ancient demesne, for it is in the nature of trespass; R. Moor, 18. 3 Leon. 3. R. Bendl. pl. 94. R. 4 Leon. 197; so, in an action for an escape, against the two sheriffs of York; R. Cro. El. 625. See Hardr. 115. Semb. Hardr. 161; so, in replevin, D. Cro. El. 625. R. Cro. El. 574. 2 Cro. 19. R. Dy. 175 a, if the defendants make consuance in *auter droit*, but not if they avow in their own right; Moor, 395; so, in ejectment of ward, or ravishment of ward; 12 H. 4, 10 b. Th. D. l. 12, c. 2, s. 31; so, in *quare impedit*; Th. D. l. 12, c. 2, s. 35. 7 Co. 26 b. Hardr. 113. Dy. 194 b. 9 H. 5, 6, 11 H. 6, 53 a; so, in an action on the case against husband and wife, where the husband is named merely for conformity, as in an action for words by the wife, if the husband die. R. Hardr. 151, or if the wife die, R. Cro. Car. 500, still the writ does not abate. Nor does it abate in a *warrantia chartæ* upon a warranty by husband and wife and the heir of the husband, if the wife die; R. Moor, 859; nor when the writ is merely to discharge the plaintiff, as in an *audita querela*; 10 Co. 135 a. Th. D. l. 12, c. 2, s. 32; nor in partition, 8 & 9 W. 3, 31. Yet even in actions founded on a tort, as in trespass, Bro. Brief, 175. Hardr. 114, in *quare impedit*, 11 H. 6, 53, [and the like, and *a fortiori* in actions on contract &c.] if one of several persons, against whom the action purports to be brought, were dead at the time of suing out the writ, this matter may be pleaded in abatement. Com. Dig. Abatement, H. 35, ante, p. 290, 291.

Coverture.] So, it may be pleaded in abatement, that the demandant or plaintiff took husband pending the writ; Th. D. l. 12, c. 12. Ast. Ent. 9, 10. Vad. M. 68. [ante, p. 286;] or that one of the demandants or plaintiffs took husband, Th. D. l. 12, c. 12, s. 2, though there were a severance after coverture, Dub. Th. D. l. 12, c. 12, s. 2. Agr. 10 Co. 134 b, or although she married by coercion of the Spiritual Court, upon a contract made before the writ purchased. 4 H. 4, 55. Per Strange, 7 H. 6, 15. Th. D. l. 12, c. 12, s. 4. But the writ shall not abate by coverture pending the writ, unless it be pleaded; Th. D. l. 12, c. 12, s. 3. R. 4 Leon. 169; nor by a marriage after verdict and before the

day in bank ; 4 H. 4, l. 1 Sid. 143. Th. D. l. 12, c. 12, s. 5 ; nor by a marriage after judgment and before execution ; 11 H. 4, 48 b. 21 E. 4, 87. [73.] Th. D. l. 12, c. 12, s. 6 ; nor by a marriage after summons and severance ; 10 Co. 134 b ; nor by the marriage of a defendant pending the writ. Adm. 2 Rol. 53. [2 Str. 811. 2 Ld. Raym. 1525. and see Barnes, 355. Lane, 42. 52.] To the plea of coverture, the plaintiff may reply that her husband is dead, and that she is now sole ; 9 H. 5, l. 1. Th. D. l. 12, c. 12, s. 7 ; or that she has been divorced from her husband ; Id. ; or that on the day of the writ purchased *et semper postea*, she was sole and not covert &c. ; Ast. Ent. 9 ; or if she reply that after the writ purchased **non cepit virum*, it is sufficient. R. Lutw. 1640, 1641. Ast. Ent. 10. Com. Dig. Abatement, H. 42. As to coverture before the commencement of the action, see ante, p. 286. 288.

Divorce.] So, in an action by husband and wife, it may be pleaded in abatement that they have been divorced pending the writ. Th. D. l. 12, c. 13. 6 E. 3, 249. 25 E. 3, 89 b. [82.] And in pleading a divorce, it is necessary to shew before whom, and for what cause. 9 E. 4, 25. [24.] Th. D. l. 12, c. 17, s. 12.

Deprivation &c.] So, it may be pleaded in abatement, that the demandant or plaintiff has been deprived, pending the writ : as if an abbot be deposed ; Th. D. l. 12, c. 17, s. 5 ; or if the warden of a hospital be deprived by his ordinary. 8 Ass. pl. 29, 31. Th. D. l. 12, c. 17, s. 4. So the writ abates by the resignation of the plaintiff, even although he be afterwards re elected. 9 H. 5, l. 1. Th. D. l. 12, c. 17, s. 8. But the writ does not abate, by the translation of the plaintiff from one bishoprick to another ; Th. D. l. 12, c. 17, s. 7 ; nor by deposition of a plaintiff who sues as executor. Per 2 J. Ow. 30. Nor shall the writ abate by deprivation of the tenant or defendant, Th. D. l. 12, c. 17, s. 2, 3, or by his resignation. 10 H. 6, 10 b. Th. D. l. 12, c. 17, s. 10. If a man plead deprivation, he should shew before whom and for what cause, 9 E. 4. 25. [24.] Th. D. l. 12, c. 17, s. 12. Com. Dig. Abatement, H. 46.

Estate determined pending the writ.] So the writ abates, if the estate of the plaintiff or defendant determine, pending the writ. Com. Dig. Abatement, H. 56.

But when the action is only for a recompence in damages, the writ does not abate by the determination of the plaintiff's estate : as, in a *quare ejecit infra terminum*, if the term expire, the plaintiff shall recover the whole in damages. 1 D. Sav. 28. 11 H. 6, s. 8. [6.] Th. D. l. 12, c. 18, s. 2. So, in ejectment, if the term expire, the plaintiff shall have judgment for his damages ; R. Sav. 28 ; [or if the plaintiff's estate in the lands determine, pending the action, he has still a right to proceed

for the recovery of his damages and costs. 2 Str. 1056.] So, a writ of waste against a lessee for years, formerly did not abate, if the term expired pending the writ; Th. D. l. 12, c. 18, s. 2. 11 H. 6, 8. [6:] and the same, as to covenant against a lessee. 11 H. 6, 8. [6:] Th. D. l. 12, c. 18, s. 2. R. 1 Rol. 82. Com. Dig. Abatement, H. 56.

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*SECT. II.—*The Form of Pleas in Abatement.*

1. *The Commencement.*
 2. *The Statement.*
 3. *The Conclusion.*
 4. *The Affidavit to Verify the Plea.*
 5. *Several Pleas.*
 6. *Effect of a Plea in Abatement.*
- ♦—

1. *The Commencement.*

The form of the commencement of a plea in abatement, is thus:—

“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]

The—day of——, 6th William 4th.

S. } “And the said J. S. in person” [or “by A. B. his attorney,”]
ats. } says that” &c. then stating the matter of the plea. See Reg.
N. } Pl. H. 4 W. 4, l. s. 10. Formerly, if the plea were of a different term from the declaration, a special imparlance must have been entered on it; but this is no longer necessary. See 1 Arch Pr. C. P. [78.]

A plea of coverture by a feme covert, sued as a feme sole, for a debt &c. contracted by her before coverture, must be pleaded in person, and not by attorney. Lil. Ent. 1. Rich. Pr. C. P. 1. But pleas in disability of the plaintiff, see Th. D. l. 14, c. 6, s. 1. and in other cases, may be pleaded by attorney.

2. *Statement of the Matter of Abatement.*

The matter of the plea has already been very fully treated of in the last section. And see the *Precedents*, 1 Went. 1.—80, and *Index*. We shall here confine ourselves, principally, to the manner in which it is to be stated.

It must be triable.] A plea in abatement must consist of matter of law, or of matter of record, or of matter of fact, in the same manner as a plea in bar. See ante, p. 171.

It must answer the whole declaration.] The rule laid down ante, p. 172, that the matter of the plea shall be an answer to the whole declaration, is equally applicable to pleas in abatement, as to pleas in bar. It is not to be inferred from this, however, that a plea in abatement must be pleaded to the whole declaration; for the defendant may plead in abatement to a part of the declaration, and plead another plea in abatement or a plea in bar to the residue; or, one of several defendants may plead in abatement, and the others in bar; as we shall see more particularly in another part of this section. But the meaning of the rule is, that the whole matter of complaint in the declaration, shall be covered by the plea or pleas pleaded. Therefore if the defendant plead in abatement only, and the plea of course profess to be an answer to *the whole declaration, but be in fact an answer to part only, it is bad; as where, on an original in debt for 1000*l.*, the plaintiff declared for 1000*l.* borrowed of him by the defendant, and in a second count for 60*l.* interest; and the defendant pleaded in abatement, that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed of the plaintiff," was borrowed by the defendant and others, and not by the defendant alone; the court, upon demurrer, held the plea to be bad, because it answered only one of the causes of action, namely, that mentioned in the first count. 5 T. R. 553.

It must not be double.] The defendant cannot plead two outlawries, or two excommunications, in abatement; duplicity in a plea in abatement, being equally the subject of a special demurrer, as in a plea in bar. Carth. 8, 9. 1 Show. 80. See ante, p. 174—176. But a defendant might formerly plead misnomer in both Christian and surname, Hardw. 286, or he may plead that both the plaintiffs are dead, 2 Lev. 82, without subjecting his plea to any objection for duplicity; although the misnomer of either name, or the death of either plaintiff, might be sufficient to abate the writ.

It must be certain.] In pleas in abatement, the greatest possible precision and certainty are required: Lutw. 15. Co. Lit. 303 a. 2 Saund. 200 b. (n.): they must be certain to a certain intent in every particular; 3 Lev. 67; that is, every necessary fact must be stated, and stated with the greatest precision, so as to leave nothing to intendment, and to exclude every conclusion or intendment against the party pleading. Thus, a plea in abatement that another, not named, sealed the bond or deed, is not good, unless it state also that such other person is still alive. 1 Lutw. 695—697. Lil. Ent. 2. 1 Salk. 32. 1 Saund.

291 a. (n. 2.) 28 H. 6, 3 a. pl. 11. So, a plea of misnomer, formerly, must not only have stated the real name, but must also have averred that by that name the party was known and called at the time of the purchase of the writ, or of the exhibiting of the bill, Gouldsb. 86. Skin. 620. 1 Salk. 6. 4 Mod. 347. and see 11 H. 6, 11 a. 6 Mod. 105, and conclude with a special traverse of his ever having been called or known by the name in the writ or bill. So, where a plea in abatement concluded by praying "if the bill" &c., omitting the word "judgment," it was holden bad on demurrer, although the words "And that the same may be quashed," were added. 2 T. R. 185.

It must not be repugnant.] The rule upon this subject is the same with respect to pleas in abatement, as in the case of a plea in bar or declaration. See ante, p. 224. 112. Thus, where a plea of misnomer was, "And the said John Germyn comes and says that his name is Gerny, and not Germyn," it was holden bad for repugnancy. Carth. 207. 1 Show. 294. Comb. 188. 1 Lutw. 10. and see 5 T. R. 487. So, a plea that A. and B. *uxor ejus* were divorced, was holden bad for the same reason; for the plea admitted them to be husband and wife. R. Cro. El. 352.

**It shall give a better Writ.*] A plea in abatement must, in general, give the plaintiff a better writ; [4 T. R. 227; for if it shew that the plaintiff could not have any writ at all, the matter should be pleaded in bar, and not in abatement. 2 B. & P. 124 n. Comb. 463. 1 L. Raym. 345.] Thus, formerly, if the tenant pleaded non-tenure as to parcel, he should shew which parcel, 5 E. 3, 144. [184.] Th. D. l. 15, c. 1, s. 2, and who was the tenant of it. 10 E. 3, 497. Th. D. l. 15, c. 1, s. 8. If he pleaded that there were three villas in S., he must shew in which of the villas the land lay. R. Yelv. 112. If he pleaded parcel in another county, he must shew how much lay there. 4 E. 3, 137. Th. D. l. 15, c. 1, s. 2. [but see 17 E. 3, 44. Th. D. l. 15, c. 1, s. 10.] Com. Dig. Abatement, I. 1. So, if he pleaded misnomer, he must have stated his right name, so as to give the plaintiff a better writ; 9 H. 5, 1. pl. 3. Finch. L. 363; and he must have stated both surname and Christian name although the misnomer were in one of them only. 8 T. R. 515.

But if the plea go to the matter and substance of the writ, it need not give a better writ: as, in a *dem fuit infra catatem* upon a demise by himself, the defendant might plead that the lease was by the plaintiff and another, without giving another writ. Th. D. l. 15, c. 1, s. 4. So, in waste, upon a demise by the plaintiff's father, the defendant might say that the father of the plaintiff did not demise, without giving another writ. 6 E. 3, 260. 10 E. 3, 525. Th. D. l. 15, c. 1, s. 5. 2.

So, in a writ of entry, supposing that the tenant had not entry but by A., to whom B. released &c., the defendant might plead that B. did not release to A., without saying to whom the release was made. Th. D. l. 15, c. 1, s. 7. So, the plea need not give another writ, when it avoids the whole action of the demandant or plaintiff: as, in real actions, if the tenant pleaded non-tenure as to the whole; 33 H. 6, 38. Th. D. l. 15, c. 1, s. 13; or, no such vill; 33 H. 6, 58. Th. D. l. 15, c. 1, s. 13; or, entry of the demandant or plaintiff pending the writ. 34 H. 6, 8. Th. D. l. 15, c. 1, s. 14. Com. Dig. Abatement, I. 2.

3. *The Conclusion of the Plea.*

Upon pleas in bar, the court will give such judgment as appears to them to be the proper one, upon a consideration of the whole record; but upon pleas in abatement, they will give no other judgment than that prayed for by the party. 10 East, 87. 1 Barn. & Ald. 172, per Bayley. Hence the necessity of great correctness in the conclusion of a plea in abatement; for if the defendant omit therein to pray judgment, or pray a wrong one, the plea will be bad. See 1 Salk. 297, 298. 3 T. R. 185. For this reason it is, that if a plea, which contains matter in abatement only, conclude in bar, it is a plea in bar, and final judgment shall be given on it; for by concluding as in a plea in bar, the defendant admits the writ to be good. 4 H. 6, 27. 36 H. 6, 17, 18 a. per Littleton. Bro. Brief, 247. 1 Sid. 189, 190. 2 Ro. Rep. 64. 1 Lev. 312. See 2 Wils. 87. Hardw. 104. And even where, to a declaration against one, on a joint contract by him and another, with an averment of *the others being outlawed, the defendant pleaded *nul tiel record* to the outlawry, and concluded in bar, the plea was holden bad on a general demurrer; for it was in effect a plea of nonjoinder, and should have concluded in abatement. 1 East, 634. On the other hand if a plea, which contains matter in bar only, conclude in abatement, it shall be deemed a plea in bar; 37 H. 6, 24 a., per Prisot, Bro. Brief, 236. 36 H. 6, 17, 18 a. per Littleton, Bro. Brief, 247. 10 H. 7, 11 34 H. 6, 1 a. Doct. Pl. 57. 285. Bac. Abr. Abatement, P. 2 L. Raym. 1018. 6 Mod. 103. 1 Lutw. 42. Cro. El. 202. 1 Mod. 230. 12 Mod. 524, 525. 1 Lev. 311, 312. and see 2 Mod. 64; for the plea cannot give a better writ; and the conclusion praying a wrong judgment, is not material in a plea in bar. In *Carneth v. Prior*, 1 Show. 4. Comb. 107, Lord Holt is reported to have holden, on the authority of the above case 36 H. 6, 18, that the conclusion of a plea in all cases decides whether it is a plea in abatement or in bar, and that if a plea conclude in abatement, although it be of matter in bar, it is

a plea in abatement. But this seems to be a mistake of the reporters. See 2 Saund 209 d. See however 6 Taunt. 587.

The proper conclusion of a plea in abatement, seems to me to be now thus: "And this he the said J. S. is ready to verify: wherefore he prays judgment of the said writ and declaration, and that the same may be quashed &c." See 12 East, 544. Praying "that the same may be quashed," without praying "judgment," has been holden ill on special demurrer. 3 T. R. 185. Formerly, if the action were by bill, the plea must have prayed judgment of the "bill;" 5 Mod. 144. 132; if it prayed judgment of the "bill and declaration" (for they were the same thing,) 5 Mod. 144, or of the "writ and declaration," 1 Barn. & Ald. 172, it would be bad. Formerly also in assumpsit, case, trespass &c., by original, where the writ contained all the particulars of the complaint, a plea in abatement concluded with praying judgment of the "writ;" Clift. 2 pl. 2. and see Id. 15. pl. 37. 1 Lutw. 14; but in debt, covenant and detinue &c., by original, where the writ was general, (see 1 Arch. Pr. B. R. 61,) if the defendant in his plea relied on matter in the declaration, he must have concluded by praying judgment of the "writ and declaration." 5 T. R. 553. See 2 Saund. 210 c. 12 East, 544. And as the law as to process and declaring thereon is now analogous to the proceedings formerly in debt or covenant by original, the writ stating shortly the form of action, and the declaration detailing the particulars, it should seem that the form of concluding a plea in abatement now, must be the same as the form formerly adopted in debt or covenant by original. Formerly, a distinction was taken, namely, that where matter in abatement, apparent upon the face of the writ, was pleaded, the plea should both begin and conclude with praying judgment of the writ; but that where the plea was founded on matter extrinsic, such as joint-tenancy, excommunication, non-tenure, misnomer and the like, the plea should only conclude with the prayer of judgment, and not begin with it. Moor, 30, per 2 J. 1 Lut. 11. But as a defendant, we have seen (ante, p. 292,) cannot now plead in abatement for matter apparent on the face of the writ, this distinction *does not apply; and accordingly in modern pleading, the plea does not begin with praying judgment of the writ &c., but concludes with it merely.

The above is the general form of conclusion to pleas in abatement. To this however there are two or three exceptions, which shall now be noticed. The plea of aliennee, concludes thus: "And this he the said J. S. is ready to verify: wherefore he prays judgment if the said J. N. ought to be answered to his said bill &c." See 3 H. 6, 55. 39 H. 6, 18. And the same conclusion is necessary, where the defendant pleads that

the plaintiff is a Popish recusant convict; Semb. Latch. 178; or that the plaintiff is an infant, and should sue by *prochein amy*. See 1 Went. 58. 62. A plea of outlawry concludes with a *prout patet per recordum*, 3 Lev. 29, and prayer of judgment if the said J. N. ought to be answered to his said bill &c. And the same, as to the plea of attainder. See 1 Went. 75. If the death of one of the plaintiffs or defendants be pleaded, the plea concludes thus: "And this the said J. S. is ready to verify; wherefore he prays judgment if the court of our Lord the king here will proceed any further in the plea aforesaid &c." See 3 Lev. 120.

4. *Affidavit to verify the Plea.*

By stat. 4 Ann. c. 16, s. 11, no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true. It is not necessary that the affidavit should be made by the defendant himself; if made by his attorney, it is sufficient. Barnes, 344. If the plea be filed or delivered without an affidavit, the plaintiff may either treat it as a nullity, and sign judgment, Carth. 402. 1 Str. 225. 639. 2 L. Raym. 1409. 1 T. R. 277. 689. 5 T. R. 210. 7 T. R. 298, and see 4 East, 348, or he may move to set it aside. 1 Str. 638. Say. 19. 293. 3 Bur. 1617, See 1 Arch. Pr. C. P. [118.] 303.

This statute extends not only to pleas in abatement, but also to all other dilatory pleas; and therefore it has been holden that a plea of aid prier in a writ of right, cannot be pleaded without an affidavit to verify it. 2 B. & P. 384. See 2 Saund. 210 e. The form of the affidavit is thus:—

"In the King's Bench.

J. N. plaintiff

and

J. S. defendant.

"J. S. of ———, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true, in substance and matter of fact.

"Sworn at &c.

J. S."

5. *Several Pleas.*

In what Cases.] A defendant shall not plead two pleas in abatement either of which goes to the whole declaration; otherwise *the plaintiff

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may object to them, by special demurrer, for duplicity. Thus, in *assise* the tenant could not plead misnomer of himself, and *hors de son fee*. Th. D. l. 15, c. 3, s. 1. So, in replevin, the defendant shall not plead property in a stranger, and also that he took the beasts in another vill. 42 E. 3, 19, [18.] Th. D. l. 15, c. 3, s. 16. So he shall not plead two outlawries of the plaintiff in abatement. Semb. 1 Show. 80. Com. Dig. Abatement, I. 3.

But he may plead a second plea in abatement, after a former plea has been determined. See ante, p. 283. As, if he plead to the person of the plaintiff, and that be over-ruled, he may afterwards plead in abatement to the writ. Th. D. l. 10, c. 1. Com. Dig. Abatement, I. 4. Or he may plead one plea in Abatement to part, and another to another part; as, non-tenure to part, and a recovery pending the writ to another part; Th. D. l. 15, c. 3, s. 11; or, in replevin for two oxen, property in a stranger as to one, and *cepit in alio loco* as to the other. 9 H. 6, 39. Th. D. l. 15, c. 3, s. 16. So, he may plead in abatement to one of several counts in *assumpsit*, though the writ be entire. 2 Lutw. 1593. Com. Dig. abatement, I. 5. Vide post.

Pleas by several Defendants.] Where there are several defendants, however, one may plead one plea in abatement, and the other another; thus, one executor may plead variance, the other *ne unques executor*, 11 H. 6, 42. Th. D. l. 15, c. 2, s. 6, 9. So, in a *quare impedit*, one defendant may plead, no such church; the other, no such bishop. Hob. 249, Com. Dig. Abatement, I. 6. One defendant however could not plead a misnomer of the other. 21 H. 6, 27. 8 H. 6, 9. 22 E. 4, 45 a. 21 E. 4, 71 b. 35 H. 6, 50. 6 Co. 64 b. Doct. Pl. 243, 244. 1 Lutw. 36.

One defendant also may plead in abatement, the other in bar. 17 E. 3, 24 b. Th. D. l. 15, c. 2, s. 3. Thus, one tenant may plead outlawry of one of the demandants; and the other may take upon himself the entire tenacy, and plead to the action. 18 H. 6, 20. Th. D. l. 15, c. 2, s. 7. In debt on bond against two, one may plead coverture in the plaintiff, and the other acknowledge the deed. Th. D. l. 15, c. 2, s. 13. Com. Dig. Abatement, I. 7.

If one defendant plead matter apparent on the face of the writ in abatement, the other need not answer. Th. D. l. 15, c. 7, s. 2. Com. Dig. Abatement, I. 8. But if the matter pleaded be *dehors* the writ, the other defendant must answer. 11 Ass. pl. 9. Th. D. l. 15, c. 7, s. 2. Where one defendant, however, pleads in abatement, upon which issue is joined, and another pleads in abatement, to which the plaintiff demurs; if the issue be found for the defendant the whole writ shall abate

upon the verdict, without determining the demurrer. R. Hob. 250. Com. Dig. Abatement, I. 9.

6. *Effect of a Plea in Abatement.*

If the issue be joined on a plea in abatement, and the plaintiff obtain a verdict, the judgment is peremptory, *quod recuperet*, in the same manner as if the trial had been upon the merits; 2 Wils. 307. Yelv. 112. 1 Vent. 22. 2 Show. 42. Gilb. C. B. 53. 1 East, 542. *2 B. & P. 389. and see Com. Dig. Abatement, I. 15; but if the verdict be found for the defendant, the judgment is that which is prayed for in the conclusion of the plea, namely, that the writ be quashed, &c. So, if the defendant have judgment on a demurrer or *nul tiel record* pleaded by the plaintiff, the judgment is, that the writ be quashed &c.; but the judgment for a plaintiff, in such a case, is not final, but a *respondens ouster* merely. See 1 Arch. Pr. C. P. 304, 305. Com. Dig. Abatement, I. 14. After judgment that the writ be quashed the plaintiff may commence a new action for the same cause; but after judgment of *respondens ouster*, the declaration still remains, and the defendant must answer over to it, either by pleading in bar, or by pleading a plea in abatement of a higher class in the order of pleading than that which he last pleaded. See ante, p 283.

A writ is divisible, and may be abated in part, and remain good as to the residue. The rule is this; if the plaintiff demand two things, and it appear from his own shewing that he cannot have an action or better writ for one of them, the writ shall not abate for the whole demand, but shall stand for so much as is good; if, on the contrary, it appear that he has a cause of action for both the things demanded, but that the writ is not the proper writ for one of them, and that he may have a writ for it in another form, the whole writ shall abate. 11 Co. 45 b. 1 H. 5, 4 b. 9 H. 7, 4 a., b. per Vavisor and Brian. 1 Ro. Rep. 11. 77. 1 Saund. 285. Gilb. C. B. 259, 260. 5 T. R. 557. per Ashhurst. See 3 Saund. 210—210 e. 2 B & P. 420. and see Com. Dig. Abatement, M. N. Hob. 279. 164. 1 Saund. 285, (n. 7.) Doct. Pl. 4, 6.

Where an original writ abates, without the default of the demandant or plaintiff, as by the death of the defendant, or of one of several plaintiffs, or the like, the plaintiff is allowed, within a reasonable time afterwards, to renew his suit, by suing out a new writ called "A Writ by Journeys Accounts." See Com. Dig. Abatement, P. The only difference between this and commencing a new action, is, that the Writ by Journeys Accounts is deemed *quasi* a continuance of the former suit, so as to preclude any defence being set up, which could not have been

set up to the original action. 6 Co. 10. Dallison 3. Bac. Abr. Abatement, Q. This writ, however, is disused in modern practice. Its principal use was, to prevent a plea of the Statute of Limitations, where the time limited by law for bringing the action expired before the first writ abated; and the effect we have seen, (ante, p. 33, 34,) is now obtained; in most cases of abatement, by other means.

SECT. III.

Replication to a Plea in Abatement.

The form of a replication to a plea in abatement, is thus :—

“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]

The—day of—6th William 4th.

N. } “And the said J. N. saith that his said writ and declaration, by
v. } reason of any thing by the said J. S. in his said plea above alleged,
S. } ought not to be quashed; because he saith that” &c., *stating
the substance of the replication, whether a denial or a confession and avoidance, in the same manner as in ordinary cases; see ante, p. 243, 255;) and, if a denial, concluding thus:] “and this he the said J. N. prays may be inquired of the country. And the said J. S. doth the like, &c. Therefore as well as to try the said issue above joined between the parties, as to inquire of and assess the damages of the said plaintiff by reason of the non-performance of the said several promises and undertakings” [or as the cause of action may be] “in the said declaration mentioned, in case the said issue shall be found for the said plaintiff, the sheriff is commanded that he cause to come here on—, twelve &c., by whom &c., and who neither &c., to recognize &c., because as well &c.; the same day is given to the parties aforesaid, &c.” Or, if the replication confess and avoid the plea, it then concludes thus: “And this he the said J. N. is ready to verify: wherefore the said J. N. prays judgment &c., and that his said writ and declaration may be adjudged good, and that the said J. S. may further answer thereto &c.” It must not conclude with praying damages; R. 3 Mod. 281. 1 Show. 155. 255. and see 6 Mod. 236; for that would have the effect of discontinuing the whole action. R. 1 Salk. 177. Carth. 138. and see Bac. Abr. Abatement, P.

The commencement of a replication to a plea in abatement, and its conclusion with a verification, vary in form, according to the prayer of judgment in the conclusion of the plea. The form above-mentioned is when the plea prays that the writ and declaration may be quashed.

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When the plea prays judgment if the plaintiff ought to be answered, the replication is thus : " And the said J. N. saith that, notwithstanding any thing by the said J. S. in his said plea above alleged, he the said J. N. ought to be answered to his said writ and declaration ; because he saith that" &c. : " And this he is ready to verify ; wherefore the said J. N. prays judgment &c., and that the said J. S. may answer his said writ and declaration &c." And the like in other cases.

Where a replication to a plea in abatement to the writ, began thus : " And the said plaintiff saith that the said declaration ought not to be quashed ;" the court held the mistake to be immaterial, and that the words " that the said declaration ought not to be quashed," might be rejected as surplusage. 1 B. & P. 60.

•CHAPTER VIII.

DEMURRER.

- SECT. 1.** *To what Defects in Pleading, a Demurrer is applicable.*
2. *Form of the Demurrer and Joinder.*
3. *Effect of a Demurrer.*

SECT. I.—*For what defects in Pleading, a Demurrer is used.*

By a demurrer, the party pleading it admits the truth of all facts correctly pleaded in the preceding pleading, (vide post, s. 3,) but denies that they are sufficient to maintain the action, or (if pleaded by the plaintiff) to bar him from maintaining his action ; thus referring the law arising on these facts to the judgment of the court. It may be pleaded to a declaration or count, to a plea, replication, rejoinder, surrejoinder, &c. ; or to an aid prier, voucher, receipt, wager of law, and the like. Co. Lit. 72 a. There cannot, however, be a demurrer to a demurrer ; for it would operate as a discontinuance to the whole action. 1 Salk. 219. 1 L. Raym. 20. Nor can either party demur after issue has been joined between them, at least without the consent of the other. 1 Show. 213. Lil. Reg. 437. 2 L. Raym. 1482.

Before we enter particularly into the subject of this section, it may be necessary to notice a few rules applicable to the subject generally. And first, if a defendant demur only, and do not plead, to a declaration, his demurrer must cover the whole declaration; otherwise it will be a discontinuance of the whole. So, if he demur to part only, he must plead to the residue; otherwise it will be a discontinuance of the whole. Ante, p. 172. As, where in trespass for taking and carrying away goods, if the defendant *quoad* the taking demur, but say nothing as to the carrying away, it is a discontinuance. R. Yelv. 5. So, if the plaintiff demur only, and do not reply, to the defendant's plea or pleas, the demurrer must cover the whole, otherwise it will be a discontinuance of the whole. Per Chamb. 2 Rol. 390. And therefore, if the defendant plead three pleas, and the plaintiff in his demurrer say *quod placitum prædictum est minus sufficiens*, it is a discontinuance. R. Yelv. 65. and see 1 Brownl. *192. Yelv. 5. And the same as to demurrers to replications, rejoinders, &c.

On the other hand, if a defendant demur to the whole declaration, and any one of the counts be good, the plaintiff shall have judgment upon that count. 1 Saund. 286. Cro. Jac. 104. 1 Wils. 248. So, in covenant, if some of the breaches be well assigned, and some not, and the defendant demur to the whole declaration, the plaintiff shall have judgment for those breaches which are well assigned. Cro. Jac. 557. 2 Saund. 380. So, if in trover for several things, the description of one of the articles be insensible or uncertain, and the defendant demur to the whole count for that reason, the plaintiff shall have judgment for the residue. 1 Salk. 218. So, in an action against the hundred, for the amount and value of money and goods of which the plaintiff was robbed, if the defendant demur to the whole count, because the goods are not specified in it, or because it is not stated whose goods they are, the plaintiff shall have judgment as to the money. R. 2 Saund. 379. Com. Dig. Pleader, C. 32, Q. 3. And where a plaintiff in *scire facias* demanded execution for a certain sum recovered by judgment of the King's Bench for damages and costs, with a *prout patet per recordum*; and also for a certain other sum adjudged to him in the Exchequer Chamber, for his damages and costs of a writ of error, without a *prout patet*: the court held that, the demand being divisible, and there being no objection to the sum first demanded, but the defect (namely, the want of *prout patet*) being in the latter part only, a demurrer to the whole declaration was bad. 11 East, 565. A demurrer for misjoinder of counts, or of breaches in covenant, however, must be to the whole declaration, and not merely to the count or breach misjoined. 1 M. & S. 355.

Where two defendants plead separately, the plaintiff cannot plead one demurrer to both pleas. 1 Leon. 139. Nor can there be one special demurrer to two or more counts, pleas, replications, &c. See 11 East, 565. Nor can a defendant demur and also plead to the same part of a declaration; a demurrer not being deemed a plea within the meaning of the stat. 4 Ann. c. 16, which allows of double pleading. Bac. Abr. Pleas, N. 1. See 11 Co. 52. 33 H. 6, 9 b, 10 a, per Prisot. But a defendant may demur to one count, and plead to another; or a plaintiff demur to one plea, and reply to another. See 2 Wils. 55. So one general demurrer may be pleaded to several counts or pleas, &c.

Where a declaration containing a good breach, also contained what was either a second breach, or a statement of special damage, and which was badly pleaded: a demurrer to the whole declaration was holden bad. *Price v. Williams*, 1 Tyr. & Gr. 197.

Having made these few general observations, we shall now proceed to consider in what cases a demurrer must be special, and in what cases a general demurrer will be sufficient.

General Demurrer.] A demurrer is general or special: general, where no particular cause of demurrer is alleged; special, where the particular defect is specifically pointed out, and insisted upon as the cause of demurrer. Co. Lit. 72 a. See 1 Show. 242. Comb. 297. Where the matter of objection is a defect in substance, a general demurrer is sufficient; but if it be a defect in form merely, the demurrer must be special. Doct. Pl. 119. Bac. Abr. Pleas, N. 6. If a declaration do not state a good cause of action, the defendant may *demur generally; for it is a defect in substance. Hob. 301. and see ante, p. 97. As, for instance, if a man bring an action for excluding him from the vestry-room, without shewing that the parish had any right to meet there, the defendant may demur generally, because no cause of action appears. 1 Str. 624. So, if a contract declared on appear from the declaration to be illegal, and consequently void, the defendant may demur generally; because no cause of action appears. See 2 Wils. 829. And if the action be upon a bond, the illegal consideration for which appears in the condition only, if the plaintiff declare on it as a common money bond, the defendant may set out the condition on oyer, and demur generally; and the same in all cases, where the condition of the bond, if set out in the declaration, would shew that the plaintiff had no cause of action. But if the action be on a recognizance, and the declaration do not state the condition, the defendant cannot demur; for *non constat* but the recognizance was unconditional: but he should avail himself of the defect, by plea of *nul tiel record*. Barnes, 330.

In like manner, if the matter of a plea in bar be no legal answer to that part of the declaration to which it is pleaded, or if the matter of a plea in abatement be not sufficient in law to abate the action, the plaintiff may demur generally. And the same as to replications and other subsequent pleadings. But it has been decided that a defendant cannot demur in abatement; or if he do, the court will give final judgment against him, and not merely judgment of *respondeas ouster*. 1 Salk. 220. 6 Mod. 195. 198. Bac. Abr. Abatement, P. And where the defendant demurred to the replication, and concluded his demurrer in abatement, it was holden to be a discontinuance of the whole action. 1 Salk. 4.

It is unnecessary in this place to state more than the general rules above-mentioned; the particular instances in which a party may demur generally have been already noticed in the preceding parts of the work.

Special Demurrer.] A special demurrer, as has been already mentioned, specifies, the particular defect objected to, and insists upon it as the cause of demurrer. Anciently, when the pleadings were *ore tenus* at bar, the demurrer was always special; for the demurrer was argued at the same time it was pleaded. And even for a long time after the practice of pleading *ore tenus* ceased, it still continued customary to specify the causes of demurrer; see 1 Vent. 240; although the only instance in which it was absolutely necessary to do so, was, in the case of a demurrer for duplicity; and which still remains the subject of a special demurrer only. 37 H. 6, 6. per Fortesc. Co. Lit. 72. 1 Ro. Rep. 112. Lutw. 4. 1 Salk. 219. 2 L. Raym. 798. 7 Mod. 71. Comb. 297. 2 Salk. 678. Hardw. 167. By stat. 27 El. c. 5, s. 1, however, the demurrer must now be special where the objection is for "any imperfection, defect or want of form in any writ, return, plaint, declaration or other pleading, process or course of proceeding whatsoever;" otherwise the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regard had to any such imperfection &c. And since this *statute, it has been holden that a demurrer for an immaterial traverse must be special; 1 Saund. 14. (n. 2.) 1 Str. 694. Ante, p. 195; so a demurrer for a negative pregnant, Lil. Reg. 437. Ante, p. 199, or to a plea because it is argumentative, Lil. Reg. 437, or because a special plea amounts to the general issue, ante, p. 180. 10 Co. 94 a. Doct. Pl. 116. Hob. 127, or for uncertainty, 1 Str. 681. 2 L. Raym. 1416. Ante, p. 222. 107, for repugnancy, 1 Str. 611. Ante, p. 112, or the like, must be special. So, in an action of covenant, where the declaration assigned breaches of several covenants, some affirmative,

some negative, and the defendant pleaded performance generally, the court held it to be matter of form merely, and that the demurrer should have been special. Cro. El. 691. and see ante, p. 217. And, in fine, if a sufficient cause of action appear in the count, or a sufficient answer to the preceding pleading appear in the plea &c., every other defect shall be deemed a defect in form, within the meaning of this statute, and can be the subject of a special demurrer only. Hob. 233.

After this statute of Eliz., however, it still remained doubtful in many instances whether certain defects were so in form only, or in substance. And it was therefore thought necessary to enact, by stat. 4 Ann. c. 16, that no advantage or exception shall be taken of or for an immaterial traverse; or the default of entering pledges upon any bill or declaration; or the default of alleging a *profert in curia* of any bond, bill, indenture or other deed mentioned in the declaration or other pleading, or of letters testamentary or letters of administration; or the omission of *vi et armis* or *contra pacem*; or the want of an averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*; or not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause, without regarding any such omissions and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer.

It is advised by Lord Hale, 1 Vent. 240, and Lord Coke, 2 Bulst. 267, to demur specially in all cases, and not to demur generally; and it is advisable, certainly, to demur specially in all cases where it is doubtful whether the matter of objection be a defect in substance or a defect of form merely. As to the particular instances in which a demurrer must be special, they have already been noticed in the preceding part of this work. See Co. Lit. 72 b.

SECT. II.

The Form of a Demurrer and Joinder.

By Reg. Pl. H. 4 W. 4, I., s. 14, the form of a demurrer shall be as follows: "The said defendant, by——his attorney," [or "in person," &c., or "plaintiff,"] "says that the said declaration" [or "plea," &c.] "is not sufficient in law;" shewing the special causes of demurrer, if any. The form of a joinder in demurrer shall be as follows: "The said plaintiff" [or "defendant"] "says that the declaration" [or "plea," &c.] "is sufficient in law."

The form of a general demurrer to a declaration, replication, or other pleading of a plaintiff, will therefore be thus:

*“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]
The—day of—8th William 4th.

S. } “The said defendant, by A. B. his attorney,” [or “in person”]
at } “says that the declaration is not sufficient in law.”
N. }

Care, however, must be taken that if the demurrer be intended as to a part of the declaration only, it be confined expressly to that part: as, for instance, if pleaded to the first count, the commencement should be “that the said first count of the said declaration is not sufficient in law.”

By Reg. Gen. H. 4 W. 4, s. 2, in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular, by the court or a judge, and leave may be given to sign judgment as for want of a plea; provided that the party demurring may, at the time of the argument, insist upon any further matter of law, of which notice shall have been given to the court in the usual way.”

The form of a joinder to the above demurrer is thus:

“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]
The—day of—8th William 4th.

N. } “The said plaintiff saith that the said declaration” [or “first
v. } count”] “is sufficient in law.”
S. }

The form of a general demurrer to a plea in bar, or other pleading of a defendant, is thus:

“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]
The—day of—8th William 4th.

N. } “And the said plaintiff says that the plea of the said defendant
v. } by him [secondly] above pleaded” [or as the pleading may be]
S. } “is not sufficient in law.”

Insert a cause of demurrer in the margin, as directed by Reg. Gen. H. 4 W. 4, s. 2, *supra*.

Joinder.

“In the King’s Bench, [‘Common Pleas,’ or ‘Exchequer of Pleas.’]
The—day of—8th William 4th.

S. } “And the said defendant says that his said plea by him [sec-
at } ondly] above pleaded” [pursuing the words of the demurrer] “is
N. } sufficient in law.”

**Special Demurrer.*

The form of a special demurrer, in the above cases, is thus :—After framing your general demurrer, as above, you then add, in the same paragraph, “and the said defendant,” [or “plaintiff,”] according to the form of the statute in such case made and provided, states and shews to the court here the following causes of demurrer to the said declaration” or “plea,” &c.] “that is to say, for that” [here state the special causes of demurrer.] “and also for that the said declaration” [or “first count of the said declaration” or “plea,” &c.] “is in other respects uncertain, informal and insufficient &c.” The cause of demurrer must be stated explicitly and with certainty : it is not sufficient to say that the plea &c. is repugnant, double, uncertain, wants form, or the like ; but the demurrer must shew in what particulars the plea is repugnant &c. 1 Wils. 219. Com. Rep. 115. 1 Salk. 219. 1 Lutw. 4. Hob. 232. 1 Saund. 161. (n. 1.) 337 b. (n. 3.)

SECT. III.

Effect of a Demurrer.

First. At common law, a demurrer was virtually a confession of all matters formally pleaded ; Co. Lit. 72 a. 5 Co. 69. Dy. 21. 5 H. 7, 1. per Davers. Doct. Pl. 116. Hob. 81. Plowd. 13 b. 85 a ; and since the statutes 27 El. c. 5 and 4 Ann. c. 16, already mentioned (ante, p. 310, 311,) it now also amounts to a confession of such matters informally pleaded, as are remedied and helped by these statutes, Hob. 233. 1 Saund. 337, 8. (n.), that is, in all cases where the informality is not assigned specially as cause of demurrer. And therefore, if a man plead a demand of a rent, and that he was there before sunset, and continued there until sunset, and that no one was there on the other part ; to which there is a demurrer : the whole fact alleged is thereby confessed, and the only thing that remains to be determined is whether it be a good demand. Plowd. 172. So, in assise, if the defendant did not traverse seisin and disseisin, but pleaded a recovery in bar, and the plaintiff confessed and avoided the recovery by his replication, to which the defendant demurred ; this was a confession of the seisin and disseisin. R. 2 Rol. 22. So, in assumpsit, stating a grant of 1000 trees to be cut down in three years, and that having cut down 800, the defendant promised to allow him to cut down the remaining 200, if he would not cut them down then ; to which the defendant pleads that he had cut down the 1000 trees before the promise, and the plaintiff demurs ;

the demurrer is a confession that he had cut down the 1000 trees before the promise. R. Yelv. 195. So, in covenant, if the defendant plead covenants performed, and the plaintiff reply assigning a breach, to which the defendant demurs; the defendant by his demurrer confesses the breach, and contradicts his own plea. R. Cro. El. 829. In debt on a bond conditioned to pay if A. died without issue living, the defendant pleads that A. died having issue living *apud* B., and the plaintiff demurs *for want of a good venue; the demurrer admits that A. had issue living at the time of his death. R. Dy. 15 a. So, in debt on bond conditioned to pay within twenty days after the return of a ship, or at the end of eighteen months; the defendant pleads that the ship returned within eighteen months, and that he paid within twenty days after; and the plaintiff replies, traversing the payment; to which the defendant demurs: the demurrer admits the breach; and it was therefore holden that the plaintiff should recover. R. 6 Mod. 349. Com. Dig. Pleader, Q. 5. So, in waste, if the defendant demurred to the declaration, and it were determined against him, a writ of inquiry issued; not to enquire of the waste, for that was confessed by the demurrer, but to inquire of damages only. 34 H. 6, 5. So, where in an action for criminal conversation the defendant pleaded not guilty and not guilty within six years; and the plaintiff joined issue on the first plea, and demurred to the second; and there was verdict for the plaintiff on the issue, but the demurrer was determined in favor of the defendant; it was holden that the defendant should have judgment on the demurrer, and that the plaintiff should not have judgment for his damages; because, by demurring to the plea of the statute of limitations, he acknowledged that the action had not been commenced within the six years. 2 Wils. 85. and see Dy. 226.

But if a count, plea or replication &c. be bad a demurrer thereto is no confession of the matter alleged. R. 2 Rol. 22. 1 Leon. 80. And therefore, if a plea in *quare impedit* shew a title in the king, and the plaintiff demur; if the plea be bad, the demurrer is no confession of the king's title. R. 2 Rol. 22. R. Hob. 164. If a replevin suppose a taking in a place in A, and the avowry be for rent in B., and the plaintiff say that B. is within A.; a demurrer thereon is not a confession of matter which is repugnant and impossible, and the ground of the demurrer. R. 1 Sid. 10. So, a thing not material or traversable is not confessed or admitted by a demurrer, when it is not traversed. R. 2 Salk. 561. Com. Dig. Pleader, Q. 6.

Secondly. A demurrer by either party has the effect of laying open to the court, not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; Hob. 56. per Hobart. 1 Saund. 285. (n. 5); and if two or more of the pleadings be bad

in substance, the court will give judgment against the party who committed the first fault. Thus, if a count or declaration be bad, there shall be judgment against the plaintiff, although the bar be also insufficient. R. 5 Co. 29 a. and see Com. Dig. Pleader, M. 1. This, however, has reference to pleas in bar only; for if the plaintiff demur to a plea in abatement, the defendant shall not take advantage of any defects in the declaration, R. Lutw. 1592. 1667. 1 Sulk. 212. Carth. 172, unless the matter of the plea be such that it might have been pleaded in bar. Semb. Lutw. 1604. If the plea be bad, and the replication bad also, and the defendant demur, the plaintiff shall have judgment; 1 Str. 302. 317. 4 Co. 84 a. Cro. El. 815. 3 Lev. 244. R. 1 Rol. 406. R. 2 Bulst. 288. R. 8 Co. 120. 133 b. R. 9 Co. 110 b. R. Poph. 209. and see Com. Dig. Pleader, M. 2; unless, indeed, the replication *shew that he had no cause of action. R. 2 Cro. 133. R. 3 Co. 52 b. R. 8 Co. 133 b. 120 b. R. Lutw. 609. R. Hob. 14. 128. Poph. 41, 42. See Com. Dig. Pleader, M. 3. All this, however, must be understood of defects in substance only; for defects in form can only be objected to by special demurrer; which, of course, can have reference only to the pleading demurred to. Thus, where the declaration was bad for duplicity, but the plea in bar was bad in substance; and the defendant demurred to the replication: it was holden that he could not object to the declaration for duplicity, that being a defect in form merely; and judgment was accordingly given against the defendant, for the insufficiency of his plea. 2 Vent. 198. 222. Bac. Abr. Pleas, K. 2.

Thirdly, as to the effect of the judgment: where there is a plea in abatement, and the plaintiff demurs to it, or the defendant demurs to his replication or the like; the judgment for the plaintiff is not peremptory, but a *respondeas ouster* merely; 2 Arch. Pr. C. P. 305. 1 East, 542, and see Com. Dig. Abatement, I. 14; after which the defendant must plead *de novo*, as already mentioned, ante, p. 306; the judgment for the defendant is, that the writ or bill be quashed &c., as prayed for in the conclusion of the plea in abatement &c.; see ante, p. 302. 306; after which the plaintiff may commence a new action.

But upon a demurrer to the declaration, or to any of the subsequent pleadings, (provided the plea be in bar,) the judgment for the plaintiff is peremptory, *quod recuperet*; and for the defendant, is, that the plaintiff take nothing by his writ, after which the plaintiff may commence a new action.

*CHAPTER IX.

PLEA PUIS DARREIN CONTINUANCE.

SECT. 1. *What, and in what Cases it may be pleaded.*

2. Form, &c. of the Plea.

SECT. 1.

Plea Puis Darrein Continuance, and in what cases it may be pleaded.

IF any new matter of defence have arisen after the defendant has pleaded, the law allows him to avail himself of it by a new plea, which is called a *plea puis darrein continuance*, from its formerly stating the matter of it to have occurred since the last continuance. And the matter thus pleaded, may be in abatement or in bar.

In abatement, the defendant may plead to the person of the plaintiff, 2 Cro. 62. 2 Vent. 58, and see 32 H. 6, 23, as that the plaintiff has been outlawed, 21 E. 4, 54. Doct. Pl. 297, 298, or excommunicated, 36 H. 6, 17, 18, since the last pleading or the issuing of the jury process, as the case may be; or that the plaintiff has entered into parcel of the lands in question, since the last pleading, &c. 2 Cro. 261. Yelv. 180. Dy. 76 b. 2 H. 6, 13. and see 32 H. 6, 2. Doct. Pl. 297, 298, 300; or the like: and this, although the defendant have already pleaded in bar; for the plea in bar is a waiver only of such matter in abatement as was in existence at the time it was pleaded. 15 E. 4, 149. *Attorn*, 66. *Bac. Abr. Pleas, Q.*

Or, the defendant may plead in bar any matter in bar that may have arisen since the last pleading or the issuing of jury process. *Adm. Co. Ent.* 518 a. *Clift.* 630. *Brownl. Rediv.* 187. 32 H. 6, 25. Thus, he may plead a recovery by the plaintiff in another action for the same cause, since the last pleading, &c. *Comb.* 357. *Bac. Abr. Pleas, Q.* and see 2 Esp. 504.

And by Reg. Pl. H. 4 W. 4. l. s. 2. it is provided "that in all cases in which a *plea puis darrein continuance* is now in law pleadable in banc, or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be."

*There is another class of pleas, namely, where the matter of the plea arises after the commencement of the action, but before plea pleaded, which are not, strictly speaking, pleas *puis darrein continuance*, and which may be pleaded in bar of the further maintenance of the suit, or in abatement, as the case may be, without saying "after the last continuance:" Per Lit. 15 E. 4, 5. Th. D. l. 14. c. 3, s. 10; even although the matter of the plea may have arisen after an imparlance over to another term. Fortesc. 338. 13 E. 4. 4: thus he may plead outlawry, R. 5 Mod. 11. 1 Salk. 178, or a release, Fortesc. 338, as an original plea, without saying "after the last continuance." And such pleas are not to be deemed to come within the rules relating to pleas *puis darrein continuance*.

It seems, a plea *puis darrein continuance* cannot be pleaded after a demurrer, Moor, 871. 1 Str. 493. Semb. 6 Mod. 9. R. Hob. 81. cont. nor after the award of a writ of inquiry on the roll, Bro. Continuance, 61. 83. 1 H. 7. 21, nor after verdict. 21 H. 6. 10. Bro. Continuance, 27. 13. 17. 38. Lutw. 1143. 1174. and see Com. Dig. Abatement, I. 34. 3 T. R. 554. It may be pleaded at *nisi prius*, however, at any time before the jury actually deliver their verdict; R. 2 Rol. 630. l. 30. 28 H. 6. 1. Bul. N. P. 310. See 5 Taunt. 337. 1 Marsh, 70. 2 Mod. 307; even although there were time to plead it in banc since the last continuance. 5 Taunt. 333. Or if at *nisi prius* the jury remain *pro defectu juratorum*, the defendant may plead *puis darrein continuance* at the day in banc, Bro. Continuance, 30. 22 H. 6. 1 b. but not afterwards unless in the case of outlawry or death. Bac. Abr. Pleas, Q. See Dy. 361. Doct. Pl. 297. And now, by Reg. Pl. H. 4 W. 4, l. s. 2, it is provided "that no such plea shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order."

For the practice relative to these pleas, see 1 Arch. Pr. C. P. [101] 172. 176. See 3 B. & A. 577.

SECT. II.

Form, &c. of a Plea Puis Darrein Continuance.

There are some instances, we have seen (*supra*) where matter of defence or abatement, although arising after action brought, need not be pleaded *puis darrein continuance*: namely, where it has arisen before plea pleaded. In these cases the pleas are the same as in ordinary cases; except that in the commencement of the plea in bar it may be advisable, until otherwise ordered or decided, to insert a clause of

actionem non, thus: "The said J. S. by A. B. his attorney, says that the said plaintiff ought not further to maintain his aforesaid action thereof against him; because he says that," &c.; and in both plea in bar and plea in abatement it should appear that the matter of the plea occurred pending the writ. *Semb. Lutw. 1178.*

*The form of a plea in bar, pleaded in banc, is thus:—

In the "King's Bench, ['Common Pleas,' or 'Exchequer of Pleas.']

The — day of — 6 Will. 4.

S. } And now at this day, to wit, on the — day of —, in the
ats. } year aforesaid, the said defendant says, that the said plaintiff
N. } ought not further to maintain his aforesaid action thereof
against him; because he says, that after the last pleading in this cause,
that is to say, after the — day of —, in the year aforesaid, when
the said plaintiff so replied as aforesaid," [or, "after the issuing of the
jury process in this cause, to wit, after the — day of —, in the year
aforesaid, when the jury process in this cause issued as aforesaid,] and
before this day, to wit, on" [&c., then stating the matter of defence, as
in ordinary cases.]

The form of a plea in bar, pleaded at the assizes, is thus:—

S. } And now at this day, to wit, on — the — day of —, in
ats. } the — year of the reign of our sovereign Lord King William
N. } the Fourth, before Sir J. A. P. and Sir J. L., knights, justices
of our said lord the king, appointed to take the assizes in and for the
county of K. aforesaid, at M. in the said county of K. comes the said
defendant by C. D. esquire, his counsel, and says [that the said plaintiff
ought not further to maintain his aforesaid action thereof against him,
the said defendant, because he says] that after the issuing of the jury
process in this cause," [&c. as in the last form.] *Doct. Pl. 297.* If
the plea is to be pleaded at *nisi prius* in London or Middlesex, the re-
quisite alteration may be made in it, from the *jurata* in the *nisi prius*
record. See 1 Arch. Pr. C. P. 152.

Affidavit.

A plea *puis darrein continuance* must be verified by affidavit, in the same manner as a plea in abatement, (see ante, p. 204.) otherwise it shall not be received; see 3 T. R. 554; or, if received, the court, upon

application, will set it aside. 1 Str. 402. The affidavit must also state that the matter of the plea arose within eight days next before the pleading of such plea, unless the court or a judge shall otherwise order. Reg. Pl. H. 4 W. 4, l. s. 2. An affidavit referring to the plea, has been holden sufficient, though not specially entitled in the cause. 5 Taunt. 337.

Replication, Demurrer, &c.

The replication and other subsequent pleadings, are the same as in ordinary cases. The demurrer to a plea *puis darrein continuance*, is also the same as in ordinary cases: with this exception, that if a plea *puis darrein continuance* in abatement be pleaded after a plea in bar and the plaintiff demur to it, the judgment is peremptory, *quod recuperet*. Bac. Abr. Pleas, Q. 1 Sid. 252.

*The plea must state the day of the last pleading, &c. and the day the matter of the plea occurred, in order that it may appear that the latter was subsequent to the former. 18 E. 4, 15 b. Doct. Pl. 59. 5 Mod. 12. Yelv. 141.

A plea *puis darrein continuance* must be pleaded with certainty. Doct. Pl. 297. Plowd. 33 b. Alleyn, 66. Lutw. 1143. 5 Mod 12. Yelv. 141. Bac. Abr. Pleas, Q. If the matter of the plea arise by deed, it must be pleaded with *profert*, as in other cases. 2 Salk. 519.

After a plea in bar, a defendant can have but one plea *puis darrein continuance*, unless it be for a matter apparent to the justices, or for the advantage of the king. Th. D. l. 14. c. 3, s. 12. 16 H. 7, 11 b. 12. Bro. Continuance, 40. Fitz. Continuance, 5. By pleading *puis darrein continuance*, also, the defendant waives his former pleading, and can never afterwards have any advantage from it. 1 Salk. 178. 1 L. Raym. 603. Consequently, before a man pleads *puis darrein continuance*, he should be satisfied that the defence he thus substitutes, is preferable to that which he relinquishes.

*CHAPTER X.

REPLEADER.

SECT. 1. *In what Cases Awarded.*2. *How Awarded.*SECT. I.—*In what Cases a Repleader is Awarded.*

WHEN issue is joined on an immaterial point, or on a point which does not determine the right, or which is so impertinent, uncertain or the like, that the court cannot give judgment, a repleader may be awarded, that is, the court may give judgment *quod partes replacitent*, beginning at the first fault which occasioned the immaterial issue. Bac. Abr. Pleas, M. 1.

If the issue be merely informal or misjoined, it is cured by verdict, by stat. 32 H. 8, c. 30. See 2 Arch. Pr. C. P. 282. Com. Dig. Abatement, O. 1. 2 Saund. 319. (n. 6); and consequently the court in such a case cannot award a repleader. But a repleader may be awarded, where the issue joined is immaterial; for that is not aided by the statute. Carth. 371. 2 Mod. 137. Cro. El. 983. 1 Lev. 32. Bac. Abr. Pleas, M. 2. An immaterial issue is, where a material allegation in the pleadings is not traversed, but an issue is taken on some point that will not determine the merits of the cause, and the court is consequently at a loss for which of the parties to give judgment. Gilb. H. C. P. 147. 1 Lev. 32. As where in debt on bond conditioned for the payment of 105*l.*, the defendant pleaded payment of 100*l.* according to the form and effect of the conditioned; the plaintiff replied that he did not pay the 105*l.*, and there was a verdict that he did not pay the 105*l.*: this was holden to be an immaterial issue, not aided by the verdict; for the plaintiff did not traverse the same payment that was alleged in the defendant's plea. Cro. Jac. 585. So, where in trespass the defendant pleaded in bar an award made between the plaintiff and A. B. of the one part, and the defendant and C., D. E. and F., of the other part, that the defendant should pay to the plaintiff and

A. B. so much in satisfaction of the trespass ; which he had paid : and the plaintiff replied that there was no such award between the plaintiff and defendant, as the plaintiff had alleged ; and issue was joined thereon, and verdict for the plaintiff : but the court held that he should not have judgment, *because instead of traversing the award set out in the plea, he had put in issue a different one between the plaintiff and defendant only. 1 Rol. Rep. 86. So, where in debt on bond conditioned for the payment of 60*l.* on the 25th June, the defendant pleaded payment on the 20th June, according to the form and effect of the condition and issue was thereupon joined ; and the verdict found that he did not pay 60*l.* on the 20th : the court held that the plaintiff could not have judgment ; the money might have been paid on the 25th though not on the 20th, and it did not therefore appear that the condition of the bond had been broken. Cro. Jac. 434. 2 Saund. 319 a. b. (n.) and see 2 Str. 994. 954. So, if plaintiff declare on a lease to A., and he says the term came by assignment to the defendant, and the defendant pleads that A. did not assign to him, upon which issue is joined ; there shall be a repleader, for the issue is obviously immaterial. 2 Str. 847. So, in debt for rent against lessee for years, the defendant pleaded that before any rent became due he assigned the term to another, of which the plaintiff had due notice : and issue was joined upon the notice, and there was verdict for the defendant : but the court awarded a repleader, because the notice put in issue was not material. 1 Lev. 32. In assumpsit against an administratrix on promises of the intestate, she pleaded *quod ipsa non assumpsit*, and there was issue thereupon ; but the court awarded a repleader, 2 Vent. 196. So, in debt on bond against an executor, the issue joined was whether the defendant had assets on the 30th November, (the day on which he had notice of the plaintiff's writ,) and it was found for the defendant that he had then no assets ; but this being deemed an immaterial issue, (for though he had no assets then, yet if he had any afterwards he was liable to the plaintiff's action,) a repleader was awarded. 2 Mod. 139. See also 2 Lev. 164. So, if the issue conclude to the country, when it should have concluded to the record, or the contrary ; 1 Leon. 90. Owen. 53 ; or if the issue joined be otherwise nugatory and void, upon which the court can give no judgment ; R. 6 Mod. 2. Hardr. 331 ; in these cases there should be a repleader. So, in all other cases, where the finding on the issue does not determine the right, the court will award a repleader, unless it appear from the record that no mode of pleading can be available. 1 Bur. 292.

The court will not grant a repleader, except where complete justice cannot be done without it : and therefore, where a motion was made for

judgment *non obstante veredicto*, on account of the insufficiency of the special pleas, and the defendant insisted that as the plaintiff had tendered immaterial issues on the pleas, and as the pleas also did not confess the cause of action, there ought to be a repleader: the court refused the repleader, as the pleas were no answer to action; granting a repleader would only be in substance allowing the defendant to set up some other defence. *Goodburne v. Bowman et al*, 9 Bing. 582.

But there shall be no repleader, where the cause of action is confessed, though the issue be immaterial; 1 Salk. 173. and see 1 Str. 394. 23: nor where, by the defect in joining issue, there is a discontinuance; R. 6 Mod. 3; nor in cases where the court may give judgment *non obstante veredicto*. Somb. sec 1 Str. 394. 5 H. 7, 29. 21 E. 4, 31. Doct. Pl. 311. 313. Doug. 396. Nor will the court award it were there has been a demurrer, 3 Co. 52 b, Ridgway. 1 Leon. 79. Cro. El. 62. 318, at least without the consent of parties; Per 2 J. Rol. 271. Moor, 461. 867. Latch. 147. Per Powl. 6 Mod. 102. R. Sav. 89. 2 Bulst. 37. and see Com. Dig. Pleader, R. 18; nor after the defendant has made default: 1 Salk. 216. 2 Salk. 579. 6 Mod. 3. 1 Str. 46; nor after a discontinuance; Comb. 323. 1 L. Raym. 20. 1 Salk. 219. nor after a writ of error; 2 Saund. 319 b. (n.); nor will they award it in favor of the person who made the first default in pleading. *Id.* Doug. 396, per Buller. But see 2 Str. 994.

If a repleader be denied where it should be granted, or granted where it should be denied, it is error. 2 Salk. 506. 6 Mod. 1. 2 L. Raym. 922.

SMO. II.

Repleader, how Awarded.

The form of the award upon the roll, is thus: (after entering the postea:) "and because the court of our lord the king here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before our said lord the king at Westminster until ———, to hear the judgment of the said court thereupon; for that the court of our said lord the king now here are not yet advised thereof &c. At which day before our said lord the king at Westminster, come as well the said plaintiff as the said defendant by their respective attorneys aforesaid; and hereupon all and singular the premises being seen, and by the court of our said lord the king now here fully understood, and mature deliberation being thereupon had, for that it appears to the court of our lord the king now here that the said plea of

the said defendant by him above pleaded in bar, and the issue thereupon joined, are immaterial and insufficient in law," [or as the case may be,] "and that no judgment therefore should be given upon the verdict aforesaid: therefore it is said to the said plaintiff and to the said defendant that they do replead &c., that is to say, that the said defendant do answer anew to the said writ, and that the said parties do further proceed therein, and that they do descend to an issue of the country thereon, or plead to the judgment of the court therein. And thereupon the said defendant says," [&c. so continuing the new set of pleadings.]

The parties are to begin at the first fault, which occasioned the immaterial issue: 1 L. Raym. 169. 21 H. 6, 14, a. L. 5 E. 4, 108. 19 E. 4, 1 b. 22 H. 6, 18, 19. Doct. Pl. 55. 311. 312. T. Raym. 458. 6 Mod. 2. 2 Salk. 579; that is, if the plea and replication be ill, the defendant shall begin, by pleading *de novo*; if the plea be good, but the replication ill, the plaintiff shall begin, by replying *de novo*.

Formerly a repleader used to be allowed, as well before verdict, as after it; but since the stat. 32 H. 8, c. 30, by which many of the defects for which a repleader was formerly awarded, are cured by verdict, the court will not now allow a repleader until after verdict. 2 Salk. 579. 6 Mod. 2.

Upon a repleader, neither party is entitled to costs. 2 Vent. 196. 2 Salk. 579. 6 Mod. 2.

•BOOK I.

PART II.

EVIDENCE GENERALLY.

CHAPTER I.

THE EVIDENCE NECESSARY TO MAINTAIN THE ISSUE.

SECT. 1. *What must be Proved.*

2. *The Manner of Proving it.*

SECT. I.—*What Allegations must be Proved.*

WHEN the pleading of either party consists of a general traverse, his adversary is obliged to join issue upon it, and at the trial must prove the facts thus traversed and put in issue. Thus, where a general issue is pleaded, the plaintiff is obliged to prove so much of the cause of action laid in the declaration or count, as is put in issue by the plea; see ante, p. 178—180; when the replication is a general traverse of the plea, the matter of defence is thereby put in issue, and the defendant must prove it; where the rejoinder is a general traverse of the replication, the matter of reply is thereby put in issue, and the plaintiff must prove it. So, where either party's pleading concludes with a special traverse, his adversary, if he join in the traverse, must prove at the trial the matter traversed. Where, in an action on a bond by the assignees of a bankrupt, the defendant pleaded payment, it was holden that it was not incumbent upon the plaintiffs to prove themselves assignees: the only matter in issue was the payment; all other matters being admitted by the plea. 1 Stark. 76. And now, by Reg. Pl. H. 4

W. 4. l. s. 21, "in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the *plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

The general rule usually laid down upon this subject is, that he who asserts the affirmative, must prove it. Gilb. Ev. 145. and see 4 T. R. 33. 3 B. & B. 302. 1 C. & P. 217. 483. But this is far from being universally true: in the first place, where the gist of the cause of action stated in the declaration is a negative, as in the case of an action for non-feasance, the plaintiff must prove the negative, if the defendant put it in issue by his plea. As, for instance, in an action against a carrier, for the loss of a parcel, it is necessary to prove that it was not delivered by the defendant to the party to whom it was directed. See 1 C. & P. 140. Where a defendant pleaded that the plaintiff did not allow or permit him &c., Abbott, C. J. seemed of opinion that the defendant, to support his plea, must have proved some positive act of obstruction by the plaintiff. 2 C. & P. 110. Where the plaintiff declared against the defendant, who had chartered his ship, for having put on board a dangerous commodity (by reason of which a loss had happened,) *without due notice* to the captain or any other person employed in the navigation; the court held that the plaintiff was bound to prove this negative, namely, the want of notice. 3 East, 192. So, where the gist of a plea (not consisting of a traverse) is a negative, as, for instance, the plea of *ne unques accouple*, Gilb. Ev. 145, 146, the defendant is bound to prove the negative, if it be put in issue by the plaintiff's replication. So, where the issue is upon the life or death of a person once existing, it has been holden that the *onus probandi* lies upon the person asserting the death. 2 East, 312. Indeed, there is one exception to this, which however is an anomaly; namely, that where a cause of action or matter of defence under a statute is pleaded, which statute contains a proviso or exception in the same substantive clause on which the action or defence is founded; although the declaration or plea must negative the cause of action or defence being within the proviso or exception, yet it is not necessary for the party to prove the negative, but it rests with the other party to prove the affirmative. As, for instance, in an action on the game laws, although it is necessary to allege in the declaration that the defendant is not qualified, yet the plaintiff is not obliged to prove this negative. 1 B & P. 468, 469; and see 5 M & S. 206. So, in an action on stat. 55 G. 3, c. 194, for practising as an apothecary "without having ob-

tained such certificate as by the said act is required," Abbott, C. J. held that the plaintiffs were not bound to give any evidence in proof of this negative, but it lay with the defendant to prove, if he could, that he had such a certificate. R. & M. 159. But with this exception, the rule we are now considering, and the several cases which qualify it, will be found to resolve themselves ultimately into the simple rule first above laid down, namely, that the matter of a pleading (always excepting a traverse, general or special.) if put in issue, must be proved by the party pleading it, whether it be affirmative or negative. As a negative is in most cases difficult of proof, the same exactness is not required as in the proof of an affirmative; and the court are therefore satisfied, in such a case, with such reasonable evidence of the negative, as appears to *be within the power of the party, and they then throw the onus of proving the affirmation on the opposite party.

As to what matters the court will judicially notice without being pleaded or proved, *see ante*, p. 95—97.

Surplusage, not.] It frequently happens that allegations occur in pleadings, which are wholly irrelevant to the cause of action or defence, &c; or which, although relevant, are unnecessary to be stated: such allegations may be rejected as surplusage, and of course need not be proved. As this is obviously a subject of essential importance to the right understanding of the matter under our consideration in the present section—for by pointing out the matters which need not be proved, it enables us instantly to ascertain what allegations must—it may be necessary to consider it here with some minuteness.

In a declaration, if any thing be stated which is wholly immaterial or irrelevant, it may be rejected as surplusage. As, in a *warrantia chartæ*, where the plaintiff declared that he requested the defendant to warrant the land to him or give him a plea a bar: upon its being objected that the declaration was insufficient, because the vouchee might plead in abatement as well as in bar, the court held that what related to the plea in bar might be rejected as surplusage: for it was only necessary to state the request to warrant, and the refusal. Hob. 23. So, where in an action against a sheriff, for taking insufficient pledges in replevin, the declaration stated that the plaintiff in replevin levied his plaint "at the next county court holden, &c. before A. B. C. & D., suitors of the court; and in evidence it appeared that the court was holden before E. F. G. & H.: the variance was holden to be immaterial, as it was not necessary to state the names of the suitors, and they might therefore be rejected as surplusage. 2 B. & C. 2. So, where in an action for an escape, the declaration stated the judgment, and also, that the court in a subsequent term awarded execution; and on the trial,

the plaintiff failed in proving any judgment in *scire facias*; the court held that it was not necessary to allege in the declaration the award of execution, and therefore it might be rejected as surplusage. 4 B. & C. 380. So, where a plaintiff alleged a condition subsequent, without stating a certain performance, it was holden that the entire might be rejected as surplusage. Plowd. 30 a. 32 b. So, in an action on a statute, where the declaration stated the action to have accrued to the king, the poor of the parish and the informer, whereas by the statute the action was given to the informer only: the court held, that what was stated as to the king and the poor, might be rejected as surplusage. Andr. 67. So, in an action by the payees against the acceptor of a bill of exchange, where, in the introductory part of the declaration, the plaintiffs were described as the executors of J. S., when in fact it appeared, from the declaration itself, and from the evidence, that the bill was made payable to them by the name of a firm under which they carried on business: it was holden that the description as executors might be rejected as surplusage. 2 Stark. N. P. C. 499. So, in an action for exhibiting an inscription opposite the plaintiff's house, insinuating that it was a house of ill fame: *it was holden that a prefatory allegation that the plaintiff carried on the business of a retailer of wines there, might be rejected as surplusage, there being no allegation that the publication was of and concerning the plaintiff as such retailer of wines. 2 Stark. N. P. C. 559. So, where the defendant agreed to pay the plaintiff 1500*l.* in two months, in consideration of which the plaintiff promised to give him a release of certain claims; in an action for the money, the plaintiff having averred that he was ready and willing to give a release (stating the terms of it,) and an objection being made on account of a variance between the release mentioned in the averment and that in the agreement, the court held the variance to be immaterial; for the plaintiff need not have made the averment at all, and it might therefore be rejected altogether as surplusage. 2 New Rep. 233. So, in assumpsit for money had and received by the defendant for the plaintiff, *ad usum* of the defendant, the court held that the words "*ad usum* of the defendant," being repugnant and insensible, might be rejected as surplusage. 1 Salk. 24. 1 L. Raym. 669, and see ante, 113. So, if a *scienter* be laid where it is unnecessary, it may be rejected as surplusage, and need not be proved: as for instance, in an action on the case for a deceit, in warranting wine as in a fit state to be shipped to the East Indies, where the declaration alleged that the defendant at the time well knew that the wine was not in a fit state to be so shipped; but at the trial the plaintiff failed in proving the *scienter*; the court held that the *scienter* was not necessary to be alleged, and

might therefore be rejected as surplusage. 2 East, 446. So, where in debt on simple contract, the sum demanded in the commencement of the declaration exceeded the aggregate of the sums in the different counts, the court held the repugnancy to be immaterial; for the demand in the commencement of the declaration might be rejected as surplusage. 1 H. Bl. 249. and see Latch. 175. Noy, 44. Yelv. 5. 1 Saund. 282. So, in all cases where any thing is stated after a viz. or *scilicet*, which is impossible, or repugnant to some material allegation which has preceded it, it may be rejected as surplusage; see 1 Salk. 325. 1 T. R. 235; but an allegation which is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, cannot be rejected as surplusage, though laid under a *videlicet*, however inconsistent it may be with an allegation subsequent; 5 East, 244; unless indeed it be unnecessary to state or prove it, in order to maintain the action. 2 B. & C. 2. See ante, p. 98—100 and see Doug. 665. and see as to the effect of a *scilicet*, ante, p. 121. 99. What has here been said as to a declaration, is equally applicable to pleas, replications and other pleadings. See ante, p. 176.

In action *ex contractu*, all allegations which cannot be rejected as surplusage, within the rules above laid down, must be proved; 3 T. R. 646; and the same, as to pleas and other subsequent pleadings in actions *ex delicto*, &c. But if the defendant in an action *ex delicto* plead the general issue, so as to put the plaintiff upon the proof of his declaration; if any part of that which is stated in the declaration be proved, and the part so proved be of itself a sufficient cause of action, the residue not proved shall not hurt. Ante, p. 118, and see post.

*The parts of a pleading which must be proved, may be considered under the following heads:—

Time.—Although the day, month and year must be alleged in a declaration, at which each particular fact therein stated took place, yet it is not in general requisite that the fact should be proved to have happened on the day thus mentioned, provided the day be stated after *scilicet*; 3 T. R. 68. and see ante, p. 102, 103; if proved to have taken place any time before the commencement of the action, see 1 D. & R. 488, consistent of course with the other facts of the case, it will be sufficient. To this rule, however, there are these exceptions; namely, 1st. That in all cases where bills of exchange, promissory notes or other written instruments, not under seal, are pleaded, the date, if stated must correspond with the date of the instrument when produced at the trial; because the date is a material part of the instrument. There are some *nisi prius* cases, however, which seem to contradict this. Where the declaration stated that the defendant on the 3d of Feb. made

his certain bill of exchange &c. and the bill when produced appeared to be dated the 6th of Feb.: Mr. Baron Thompson ruled that the variance was immaterial, ever although the day was not stated after a *videlicet*; for the day was not alleged as the *date* of the bill. 2 Camp. 307 n. So, where the declaration alleged that a bill of exchange, drawn on the 10th of August, was "afterwards to wit on the same day and year aforesaid accepted" by the defendant; and the bill when produced appeared to be accepted on the 19th of September: Lord Ellenborough held the variance to be immaterial, the day being laid after a *videlicet*. 4 Camp. 209. But in another case, where the declaration alleged that the defendant, on &c. made his certain bill of exchange, "bearing date the same day and year aforesaid," and the real date of the bill was different, Lord Ellenborough held the variance to be fatal, and nonsuited the plaintiff. 2 Camp. 307 n. Secondly, deeds, we have seen (ante, p. 103,) must be pleaded either according to the date they bear, or to the day on which they were delivered. Therefore, it should seem, if a deed, produced in evidence, bear date on a day different from that stated in the pleading, the variance will be fatal, unless the party producing it prove that it was delivered on the day alleged. Thirdly, if any time stated in a pleading is to be proved by matter of record; if the time so stated be a part of the description of the record, the slightest variance between the time so stated, and that appearing from the record when produced, will be fatal. See post, p. 336. But where the statement in the declaration is descriptive, not of the record or writ, but of some facts to be proved by it, there a variance will not be material. 4 B. & A. 435. 3 B. & C. 2. And lastly, when the precise date of any fact is necessary to ascertain and determine with precision the cause of action, any the slightest variance between the declaration and evidence in that respect will be fatal: as, in an action on the statute of usury, the agreement to forbear and give day of payment being stated in the declaration to have been on the 14th, under a viz. but it being proved that the money was not advanced until the 16th, the plaintiff was nonsuit. 2 Saund. *291 b. Per Lawrance, J. 6 T. R. 460. Cowp. 671. Ry. & M. 153. As to the cases in which a day laid may be rejected as surplusage, see ante, p. 99, 101.

In a *qui tam* action for usury, the time of the usurious contract must be proved exactly as laid; the slightest variance is fatal, even although the evidence prove the usury. *Fox v. Keeling et al.* 2 Ad. & E. 670.

The rules above stated, are equally applicable to pleas and other subsequent pleadings. See ante, p. 224. 213. 261.

Place.] In local actions, the county stated as venue, we have seen (ante, p. 77,) must be that in which the cause of action arose; and the

plaintiff at the trial will be confined in his proof to that county. But if the parish &c. be stated, he will not be confined in his evidence to that parish or place, but may prove the cause of action to have arisen in any other parish within the county; with the following exceptions, however: First, in actions upon statutes, where a part of the penalty goes to the poor of the parish, the offence must be proved to have been committed in the parish laid in the declaration. See 3 Esp. 219. Secondly, in actions against hundredors, the robbery &c. must be proved to have been committed within the hundred stated in the declaration. See 3 Mod. 258. 1 Show. 60. Thirdly, in replevin, the taking must be proved to have been in the place, as well as the vill or parish and county, stated in the declaration. Hob. 16. Co. El. 896. Moor, 678. 1 Brownl. 176. 1 Sid. 9, 20. Carth. 168. Fourthly, in trespass *quare clausum fregit*, when the parish, place and abutments of the premises are set forth, they must be proved as laid. See ante, p. 104. And lastly, in all other cases where the parish or place is mentioned as matter of local description, (where a local description is requisite,) it must be proved strictly as laid. Thus, in an action for non-residence, the parish was styled in the declaration St. Ethelburg, and the real name appearing in evidence to be St. Ethelburga, it was holden a fatal variance. 2 B. & P. 281. So, where the declaration described the lands to be in the parish of B. and M., and in the deed produced at the trial it was "the parishes" of B. and M., it was holden a fatal variance. 6 Taunt. 394. and see 2 Camp. 5 n. 274. 4 Taunt. 671. In trespass for breaking and entering a house situate in the parish of Clerkenwell, it appeared at the trial that there were two parishes in Clerkenwell, namely, St. James's and St. John's, and that the house was situate in the former; and Gibbs C. J. nonsuited the plaintiff for this variance. 1 Holt, 523. But where in ejectment, the premises were laid to be in Farnham, and proved to be in Farnham Royal, it was holden not to be a fatal variance, unless it were shewn that there were two Farnhams. 13 East, 9. See Str. 595. And even where it appeared that there were two places called Westbury in the same county, one called Westbury upon Trym, the other Westbury upon Severn, and the declaration described the lands as lying in Westbury generally, the proof being that they lay in Westbury upon Severn: the court held this to be no variance; if indeed the declaration had described them as being in Westbury upon Trym, it would have been different. 5 M. & S. 326. See 8 Taunt. 539. In an action for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water called T. the variance is fatal. 2 East. 500.

but see *Id.* 497. But in a declaration for setting up a certain mark in front of *the plaintiff's dwelling-house, in order to defame him as the keeper of a common bawdy house, if the house be described as situate in A. street, in the parish of O. A., (there being no such parish,) and the nuisance be stated to have been erected in the parish aforesaid; as this is not a local action, the parish and street stated will not be deemed local description, and therefore not material to be proved as *hid.* 11 East, 226. So, in an action on the case for negligence, proof that the defendant's boat ran down the plaintiff's in the Halfway Reach in the Thames, will support an allegation that the boat was run down in the Thames near the Halfway reach; for the place is not material. 4 T. R. 558. In assumpsit for use and occupation, it is not necessary to state in what parish the premises are situate; 6 East. 348; and it has been holden that if in such a case, the parish be described by a wrong name, it is immaterial, at least if it be described by a name generally known, and which could not therefore mislead the defendant. 1 Taunt. 570. see 1 B. & P. 225. but see 3 Camp. 235. cont.

But in general, in actions on contracts, if the name of a place form a material part of the description of the contract, it must be proved as laid, and the slightest variance will be fatal: as where in covenant, the premises were named in the declaration the "Collar-beer Field," and in the lease the "Aller-beer Field," this being part of the description of the deed declared on, the variance was deemed fatal. 9 East, 188. So, where the declaration described the lands to be in the parish of B. and M., and in the deed it was "the *parishes* of B. and M.;" it was holden a fatal variance. 6 Taunt. 304. And see 2 Camp. 274. 4 Taunt. 671. So, where the defendant's tenancy of land in F. was alleged as the consideration for his promise to manage it in a husbandlike manner, and it was proved that the land was in F. and C., this was holden to be a fatal variance. 4 Taunt. 700. So, in an action for a seaman's wages, the voyage being described as "from London to Africa, and from thence to the West Indies," but, in the articles, called a voyage "from London to Africa and from thence to the West Indies or America, and afterwards to London or other port of delivery," the variance was deemed fatal. 2 B. & P. 116. But where in an action upon an agreement to procure the plaintiff a booth at a horse-race on Barnet Common, the declaration stated the common to be in Middlesex, whereas it was in Hertford, the court held the variance to be immaterial; for the county was no part of the description of the contract, and might therefore be rejected as surplusage. 4 T. R. 561 n.

In all other cases, where the parish or place is not matter of local description, or as descriptive of the contract &c., it may be rejected as

surplusage. And in transitory actions, even the county stated is not material; with this single exception, namely, where the venue has been changed, and the plaintiff has brought it back, upon the usual undertaking to give material evidence in the county in which the venue was originally laid. See R. G. H. 2 W. 4, s. 103. 2 Arch. Pr. C. P. 193. 2 B. & Ad. 169.

So, where issue is joined upon a plea, and the matter of defence is local, the defendant will be confined in his proof to the county stated, and to the parish or place if material, in the same manner as *a plaintiff is in local actions. But if the matter of the plea be transitory, in which case, we have seen (ante, p. 214,) the plea follows the place in the declaration, the matter of defence may be proved to have arisen in any county. Ante, p. 225. And see as to replications, ante, p. 261.

Cause of Action.] In real and mixed actions, (with the exception of ejectment,) the plaintiff's title must be proved as laid. Therefore, if the demandant count of his own seisin, he cannot recover on proof of a seisin of his ancestor and a descent to him; if he count of the seisin of his ancestor, and state a title as son and heir, he shall not be allowed to prove a title as cousin and heir.

In ejectment, the cause of action stated in the declaration is wholly a fiction. But a good and sufficient title in the lessor of the plaintiff, must be proved at the trial.

In actions *ex contractu*, the whole of the contract set out, or such part of it as is put in issue, must be proved. 3 T. R. 646. 4 Camp. 22. And it must be proved strictly as laid; for the slightest variance in substance between the contract laid and that proved, will be fatal. 1 T. R. 240. 2 Stark. 60, 336. 1 Id. 3. Thus, a variance between the description of a written instrument in the pleadings, and the instrument itself when produced in evidence, in any material part, will be fatal. As for instance, where an agreement is described as made by three, and it appears when produced to be made by two only, it is a fatal variance. 5 B. & C. 909. So, where a bill drawn by John Crouch, was declared upon as drawn by John Couch, the plaintiff was nonsuit. 3 B. & P. 559. See 2 Stark. 29, 336. So, in an action for usury in discounting two bills of exchange, one of which was described as drawn by B. on a certain person, to wit, John K.; and the bill when produced appeared to be drawn upon Abraham K.: the variance was holden fatal. 4 Taunt. 810. See Ry. & M. 190. So, in an action of covenant, where a lease, purporting in the commencement to be made by James Cook, but in fact executed by George Cook, was declared upon as a lease made by James Cook, the variance was holden fatal. Moody & M. 6. So, in covenant on a lease, a mistake in the name of a per-

son, stated in the demise as late tenant of the premises, was holden a fatal variance. 1 Camp. 195. See 1 Brod. & Bing. 443. 1 Barn. & Ald. 57. So, a variance in setting out one of several covenants in a lease, viz. the "Cellar-beer Field," instead of the "Aller-beer Field," was holden to be fatal; 9 East, 188; because the name of the field formed a material part of the description of the contract. So, where the plaintiff declared in covenant, that the defendant demised to him a wharf and store-houses, and in the deed it was "*store house*;" this was holden a fatal variance, even although the breach assigned had no reference to the store-house. 4 M. & S. 470. See 6 Taunt. 394. 3 M. & S. 169. So, where the declaration described the lands to be in the parish of B. and M., and in the deed it was "the parishes" of B. and M., it was holden a fatal variance. 6 Taunt. 394. and see 2 Camp. 274. 4 Trunt. 671. So, where the declaration stated that by a certain indenture it was witnessed that in consideration of certain furnaces to be erected by the plaintiff, A. B. did demise &c.; and *the deed produced in evidence was, in consideration of the erection of the furnaces and also for building certain houses and payment of rent, A. B. did demise &c.; it was holden a fatal variance. 2 Barn. & Ald. 765. and see 4 Camp. 20. 3 Id. 247. 1 Stark. 69. 2 Id. 60. 1 Barn. & Ald. 9. So, where the declaration stated that the defendant promised to farm lands demised to him in a husband-like manner, and the written agreement when produced was to farm the lands in a husbandlike manner "to be kept constantly in grass;" the court held that these latter words were a qualification of the other part of the promise, and that, as it was not stated, there was a material variance between the declaration and proof, which was fatal. 5 B. & C. 509. So, in an action on a bail bond, where the declaration describes the bond as conditioned for the appearance of the defendant in an action upon promises, and in the bond, when produced, it was found that the words "upon promises" had been omitted, it was holden a fatal variance. Ry. & M. 93. So, where the declaration in an action for a seaman's wages described the voyage as "from the port of London to the coast of Africa, and from thence to the West Indies," and upon the ship's articles being given in evidence it appeared that the voyage was "from the port of London to the coast of Africa, from thence to the West Indies or America, and afterwards to London or to her delivering port in Europe," the variance was fatal. 2 B. & P. 116. So, where the plaintiff declared on a general covenant to repair, and the covenant appeared in evidence to be a qualified covenant, namely, to repair, "fire and all other casualties excepted;" Lord Ellenborough held the variance to be fatal. 4 Camp. 20. 2 Bro. & B. 395. So, in an action against carriers for the loss of a parcel, the declaration sta-

ted a promise to deliver it safely, in consideration of certain hire and reward, and the contract proved by the production of the defendant's receipt for the parcel, was, to deliver it safely, " fire and robbery excepted : " the court held the variance to be fatal. 2 B. & C. 20. So, in assumpsit on a warranty of a horse, the declaration described it as a general warranty that the horse was sound, and the warranty proved, was, that the horse was sound, except a kick on the leg : the court held the variance to be fatal. 4 B. & C. 445. So, evidence of an under-lease, has been holden not to support an allegation that all the lessee's estate came to the defendant by assignment. 1 Doug. 183—187. So, an allegation that all the lessee's interest in the demised premises came to the defendant by assignment, is not proved by evidence of an assignment of the lessee's interest in part of the demised premises. 1 Doug. 183. n. 184. n. So, in debt or covenant for rent, if the rate of rent *per annum* be misstated ; 2 Doug. 665. See 4 Taunt. 320 ; or in debt or assumpsit on a bill of exchange or promissory note, if the amount of the bill or note be misstated ; the plaintiff must be nonsuit ; because the sum in these cases is a part of the description of the contract itself. And in an action upon a promissory note for 171*l.* 17*s.* 6*d.*, which the declaration stated was made in Dublin and payable there, the court held that as it was not stated that this sum was Irish currency, it must be understood to be English, and that proof of a note for so much Irish currency did not support the declaration. 1 B. & C. 16. In replevin, where the avowries stated a *tenancy upon certain terms, and the lease when produced, proved it to be upon other and different terms, Park, J. held the variance to be fatal, and refused to permit the defendant to amend. 3 Car. & P. 594. So, in all other cases, where there is any variance in substance between the deed itself, and the statement of it in pleading, the opposite party may take advantage of it at the trial, if the deed be put in issue. See ante, p. 132.

But as it is not necessary to set out the whole of a deed ; and as the material and necessary parts set out, need not be set forth in letters and words, but it is sufficient to state merely the substance and legal effect of them : ante, p. 132. 1 Saund. 233. (n. 2) : a variance in these respects is of course not material. So, a variance between the deed given in evidence, and that stated in pleading, in the words of grant, or those parts of it which are usually taken to designate the conveyance, is not material ; for deeds may be pleaded according to their legal effect, without reference to their form. See ante, p. 131, 132. Thus, if a lessee for life or years, grant, or release or discharge to his lessor, all his right, title and estate in and to the land he holds ; as this is in legal effect a surrender, we have seen that it must be pleaded as

such: ante, p. 139: and consequently no objection could be made, on the ground of variance, when such a deed should be given in evidence at the trial. So, if a deed operate as a covenant to stand seised to uses, and is pleaded as such, (see ante, p. 140. 131,) no objection can be made for any variance, in form merely, between the deed pleaded and that given in evidence. So, a feoffment by a joint-tenant to his companion, must be pleaded as a release; ante, p. 131; and no advantage can be taken of the variance. But this rule of pleading must not be considered as preventing a party, pleading a deed, from setting out in *hæc verba* so much of it as may be necessary, although the legal effect of the whole deed may be different from that which the part set out imports: it cannot be objected to on the ground of variance; 1 B. & C. 358; although if a pleading affect to describe a deed by its legal effect, and misdescribe it, the variance will be fatal. *Id.* Per Cur. And in all cases, where a deed &c. is described correctly in substance and legal effect, a variance in matters not material, will not hurt: therefore, where in debt on a mortgage-deed, the plaintiff declared that the defendant bound himself, his heirs, executors &c., and the word "heirs" was not in the deed produced, the court held that the variance was not material; the action being against the mortgagor himself. 4 M. & S. 474 n. So, where the plaintiff declared on a joint bond, and the bond produced was joint and several, Dampier, J. held the variance to be immaterial. 4 Camp. 34. So, where the declaration stated that a conveyance of certain property was made to the defendant, and in evidence it appeared to have been made, not to him, but to his nominee, Best, C. J. held it to be no variance. 1 Car. & P. 586. So, in covenant for non-payment of rent, the declaration stated the lease to be for twenty-one years, and the lease was for that time, but determinable at the end of seven or fourteen years, at the option of either party; Lord Gifford, C. J. held that this was not a variance. 1 Car. & P. 80. So where a declaration on a bail-bond, after stating the issuing, of the writ form "the Court of Common Pleas, the arrest, bail-bond, &c., stated the condition of the bail-bond to be for the appearance of the defendant "in the said Court," and the bond, when produced, was conditioned for an appearance "before our Sovereign Lord the King at Westminster," to answer the plaintiff in a plea of trespass, and also in a plea of debt "according to the custom of the King's Court of Common Bench:" this was holden to be no variance. 3 Car. & P. 281. So, in an action for libel, where the declaration as inducement stated that a letter was addressed to R. S. containing the words and matter following, and then setting out the contents, but in one part instead of the words "which you may with perfect propriety and safety accede

to," the words in the declaration were "which you may with perfect propriety accede to : " Abbott, C. J. held this not to be a material variance the letter not being the libel complained of, and it not being necessary to set out more than the substance. 2 Car. & P. 307. In an action on a replevin bond, the declaration stated the condition of the bond to be, to prosecute with effect his action for taking and unjustly detaining " his goods and chattels in the said condition mentioned ; " and from the bond, when produced, the condition appeared to be, to prosecute with effect his action for taking &c. the goods and chattels of the defendant in his dwelling house, farm, lands and premises, viz. in the parlour a carpet &c., and " growing crops of corn, 24 acres of wheat then growing in a field called " &c. : this was holden to be no variance, because the description of the bond in the declaration, as far as it went, was correct ; and besides, by stat. 11 G. 2, c. 19, growing corn must be considered a chattel for this purpose. 1 Bing. 6. So, in an action upon a covenant for payment of money by instalments, the declaration in stating the covenant as to one of the instalments, stated it to be to pay in " twelve months," instead of " twelve calendar months," as in the deed : the court held this not to be a material variance, as it appeared evident from the declaration itself, that the parties, by the word " months," meant calendar months. 3 B. & B. 186. So, in an action on a written contract for the sale of some East India rice, where it was objected at the trial that it appeared from the contract produced that the sale was " per sample," which words were omitted in the statement of it in the declaration : the court held the variance not material ; the words " per sample " merely implied a collateral engagement on the part of the seller that the rice was of a particular quality, the breach of which might furnish a defence to the defendant, but need not be stated by the plaintiff. 4 B. & Ald. 387. So, where in a declaration against several as drawers of a bill of exchange, it was stated that they made their certain bill of exchange in writing, their own proper *hands* being thereunto subscribed, and the bill produced was signed "*Murs and Co.*" (which was the name of the defendant's firm), Lord Ellenborough refused to nonsuit the plaintiff. 2 Camp. 305. So, in an action on certain promissory notes, the declaration stated the notes to have been made by the defendant. " his own proper hand being thereunto subscribed," and at the trial the notes were proved to be signed, not by the defendant, but by his son with his authority : Lord Tenderden, C. J. held, that the variance was not material, as those words might be rejected as *surplusage. Moody & M. 182. So, where the declaration stated the bill to be for value *delivered*, and the bill produced was for value *received*, the variance was holden to be im-

material. 2 Camp. 306. So, where a bond to A. in 40*l. solvendum* to his attorney, was declared on as a bond payable to A. himself, it was holden no variance. 2 Salk. 659. 2 Ld. Raym. 1043.

A variance in substance, however, between the contract laid and that proved, is in all cases fatal, as well when the contract is merely verbal, as when it is in writing. See 5 Bur. 2589. 2 W. Bl. 684. 2 Esp. 708. Where, in an action against a carrier, the declaration stated the contract to carry from B. to C. and the contract proved was to carry from A. to C., it was holden a fatal variance. 2 Stark. 885. So, an averment that stock was to be transferred on request, was holden not to be proved by evidence that it was to be transferred on a certain day. 5 East, 111. See 2 Barn. & Ald. 335. Peake, 42. So, in debt for a penalty on the statute of usury, where the declaration averred that afterwards, to wit. on the 3d July, 1824, the defendant did lend &c. to T. D., and did forbear and give day of payment for the same to the said T. D. from the lending and advancing thereof, until &c. ; and at the trial the money was proved to have been advanced on the 5th July, and not on the 3d : Abbott, C. J. held the variance to be fatal ; the day of the lending is in such a case material, for the declaration must show with certainty the time of forbearance, in order that it may appear that the interest taken was usurious ; and as it was material, the variance was fatal, even although the day was laid after a *videlicet*. Ry. & M. 153. So, where the plaintiff covenanted to build two houses for 500*l.*, by a certain day, and averred in an action of covenant for the money that the houses were built in the time ; evidence that the time had been enlarged by parol agreement, and the houses built within the enlarged time, was holden not to support the declaration. 3 T. R. 590. So, in an action by the vendor against the vendee of a house, upon an agreement for the purchase of it, the plaintiff, in his declaration, stated that at the time of the agreement he was possessed of the house for the residue of a term ending in 1856, and in evidence it appeared that he had then but a term for ten years, but that afterwards he obtained a new lease for the time stated : Best, C. J. held the variance to be fatal. 3 Car. & P. 267. So, in an action on an agreement to sign a bail-bond for one G. F. if tendered to the defendant within a month, the declaration averred that it was tendered within a month, but the evidence was, that the sheriff's officer within the month, asked the defendant to sign a bail-bond for G. F., (having a blank one then in his possession ready to fill up,) which the defendant refused to do, and that after the month a bail-bond was regularly tendered to him for execution, which he also refused to sign : Abbott, C. J. held this variance to be fatal. Ry. & M. 348. So, in an

action for use and occupation by a dean and chapter, where the name of the present dean was mentioned in the beginning of the declaration, and the occupation was stated to be by permission of the said dean and chapter, but the occupation proved was in the time of a former dean, the variance was holden fatal. 1 Camp. 466. So, if a contract be in the alternative, if not declared upon as such, the variance *between the contract laid and that proved will be fatal: therefore where one of two counts in a declaration stated the contract to be to deliver 40 sacks of wheat on a certain market-day, and the remainder of 100 sacks at the next market day; and the second count stated it to be, to deliver 50 sacks on the first market-day &c.; and the evidence was of a contract to deliver 40 or 50 sacks on the first, and the remainder of 100 on the next market-day: the court held the variance to be fatal. 2 East. 2. and see Id. 4 n. So it was holden that evidence of a corrupt agreement for the forbearance of payment *till one or other of two days*, at the option of the borrower, would not support a pleading stating it as an absolute forbearance till one of those days. 3 T. R. 531. So, where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4s. per stone; and the contract proved was, that he should deliver it at 4s. per stone, "and so much more as the plaintiff paid to any other person:" the court held this to be a fatal variance. 1 T. R. 447. But where a sum thus stated is not descriptive of the contract, but merely of the entire sum which the plaintiff seeks to recover as his debt or damages, it need not be proved as laid: thus, in debt on simple contract, the plaintiff may recover a less sum than he demands in his declaration. 1 H. Bl. 249. So, in *indebitatus assumpsit*, the amount of the debt need not be proved as laid. Where a certain sum of money, however, is stated as the consideration of a promise, and not laid after a *videlicet*, it must be proved as laid; for in that case it forms part of the description of the contract. Thus, where the declaration stated the consideration to be the purchase of sheep for 54*l.* 11*s.* 6*d.*, and the price proved was 54*l.* 12*s.* 6*d.*, the plaintiff was nonsuit for the variance. 3 T. R. 67. cit. So, where the consideration stated was the forbearance of payment of 21*l.* 6*s.*, and the sum proved was 20*l.* 18*s.*, it was holden a fatal variance. 3 M. & S. 173. But where the declaration stated a sale of certain goods and chattels to wit, 328 chests and 30 half chests of oranges and lemons, at and for a certain sum, to wit, the sum of 623*l.*, and the evidence was of a sale of 308 chests and 30 half chests of oranges, and 20 chests of lemons; the court held that the variance was not material, the quantity and quality of the goods being laid after a *videlicet*. 8 Taunt. 107. And where in a declaration on stat. 11 Geo. 2, c. 19, s. 3, for double

value of goods removed to prevent a distress, it was averred that 57*l.* was due for rent before the removal of the goods, the court held that this averment need not be proved as laid: because it was immaterial what rent was due, the action being, not for double the amount of the rent, but for double value of the goods removed. 3 T. R. 643. So, in all other cases, a variance between the pleadings and the proof, as to any matter which is not material, shall not hurt. And therefore, in an action on a policy of insurance, where the declaration stated that after the making of the policy the ship sailed, and the evidence was that the ship sailed before, the court held the variance to be immaterial. 5 T. R. 496. So, where the declaration in an action against a sheriff for a false return to a writ, averred that the defendant, from the day of the delivery of the writ, until and at and after the return thereof, was sheriff &c., and from the evidence it appeared that he had ceased to be sheriff five days *before the return of the writ, the court held the variance to be immaterial. 3 D. & R. 483. So, in an action for misusing a horse lent on hire, the declaration described it as a horse, and the evidence proved it a mare, the variance was holden immaterial. 2 Car. & P. 351. So, in an action against an overseer of the poor of the parish of Westhampnett, for supplying provisions for them, the declaration charged him with supplying goods and provisions for the poor of that parish, and the evidence was, that the master of the work-house who had contracted for the maintenance there of the poor of that and four other parishes, had bought four sheep from the defendant for the use of the workhouse generally: the court held, that as no objection for this variance was made at the trial, the defendant could not avail himself of it afterwards in banc; and that even if the objection had been made, they doubted whether they would have deemed the variance material. 1 B. & C. 77. Where in an action for usury, the declaration stated a specific sum to have been lent, but the evidence was of a loan, part in money, and part in gold of a known definite value, which the party borrowing had agreed to take as cash; the court held that the evidence supported the declaration. 1 H. Bl. 263. 5 Taunt 288. 1 Marsh. 33. And in an action by the consignor of goods against a carrier for non-delivery of them, the declaration stated that in consideration of the hire to be paid by the plaintiff, the defendant undertook to deliver &c., and the evidence was that the hire was to have been paid by the consignee, it was holden not to be a variance, the consignor being liable by law. 1 T. R. 659. So, in all cases it is sufficient to set out a contract according to its legal effect; and if the statement differ in form merely from the contract given in

evidence, the variance will be immaterial. 3 B. & B. 359. See 2 B. & Ad. 232.

Under a count for money had and received by three defendants, it was holden that the plaintiff could not give in evidence money had and received by them and by a fourth partner who had since died. 6 T. R. 363. But in a recent case, which was an action against three defendants, as acceptors of a bill of exchange, and the bill when produced appeared to be accepted by four, the court held that no advantage could be had of this as variance, but the defendants should have pleaded the nonjoinder in abatement. 1 Barn. & Ald. 224.

As to records: the allegations in pleading, which may be proved by a record or a copy of it, are of two kinds, namely, those which are descriptive of the record, and those which are not so, but which merely state some matter of substance which must be proved by a record or copy: the former must be literally proved; the latter substantially. This distinction seems to have been first taken in the case of *Parcell v. Mucnamara*, 9 East, 157, and has ever since been recognized and observed; see 4 B. & A. 435; 3 B. & C. 3; the rule was formerly otherwise. See 4 T. R. 590. Thus, in debt on judgment, the declaration stated the judgment to have been recovered in Trinity Term, 1787, in an action brought by the defendant against the plaintiff, and the record produced was of a judgment recovered in Easter Term, 1788, in an action brought by the defendant against the plaintiff and another: the court held the variance to be fatal. 1 H. Bl. 49. and see 4 Taunt. 13. And the same in all other cases where *nul tiel record* is pleaded. But in cases where a matter of record is stated in a pleading, by way of inducement merely, or where a fact is stated (not being the description of a record) which is to be proved by a record or a copy of it, there, if the substance of the allegation be proved by the record or copy, it will be sufficient. Therefore in an action for a malicious prosecution, where the declaration stated that the plaintiff was tried upon the indictment and acquitted on the Morrow of the Holy Trinity, and from the postea when produced it appeared that the trial was on Tuesday next after the end of Easter Term: the court held the variance not to be material: the substance of the allegation was, that the plaintiff was tried and acquitted, and that was proved by the record. 9 East, 157. See 4 T. R. 590. cont. So, in an action upon an agreement to indemnify the plaintiff for becoming bail for another, the declaration stated that judgment against the principal had been obtained in Michaelmas Term, and from the copy of the record produced in evidence it appeared to have been obtained in Hilary Term: the court held the variance to be immaterial, as the substance of the allegation had been proved. 4 B. &

A. 435. So, in an action against a sheriff for a false return to a *feri facias*, the declaration stated the judgment to have been obtained in Trinity Term 2 G. 4, and the record when produced showed that the judgment was obtained in Easter Term 3 G. 4: it was objected that as the statement of the judgment in this case concluded with a *prout patet per recordum*, it must be taken to be descriptive of the record, and the variance consequently fatal; but the court held that it was not a matter of description, being mere inducement, and that the introduction of the *prout patet* being therefore wholly unnecessary and immaterial, might be rejected as surplusage; they held that the variance was therefore immaterial. 3 B. & C. 2. See 1 Esp. 355. And where an indictment for perjury alleged the perjury to have been committed in a trial before Littledale, J., and the *postea* when produced stated the case to have been tried before the Lord Chief Justice, but it was proved by witnesses to have been actually tried before Mr. Justice Littledale: Abbot, C. J. inclined to think the variance immaterial, and refused to stop the trial of the indictment on that objection. *R. v. Coppard, Moody & M.* 118. So, in an action for a malicious arrest, where a judgment of *non pros* in the former action was stated thus: "and it was thereupon considered that the then plaintiffs should take nothing by their writ, but that they and their pledges to prosecute should be in mercy, &c.," but in the record produced the words "and their pledges to prosecute" were omitted, and "&c." substituted: this was holden to be no variance. 13 East, 547. But even in those cases, where the statement is matter of substance and not of description, the record or copy produced to prove it must prove it substantially, though not literally. Therefore, in an action for a malicious arrest, a statement that the plaintiff was nonsuit was holden not to be proved by evidence of a discontinuance. *Moody & M.* 253. So, a statement that an action was discontinued, is not sustained by proof that no further proceedings were taken in it. 3 Car. & P. 190. So, in an action *on an agreement to indemnify the plaintiff for his joining in a bond of indemnity to the sheriff, the declaration stated, as inducement, a judgment obtained by the sheriff against the plaintiff on his bond, and described it as in an action in the Court of King's Bench; whereas it appeared from the copy of the record produced in evidence to have been in the Common Pleas: Lord Tenterden, C. J., although he doubted whether the declaration, from the manner in which it was otherwise framed, needed to have stated the judgment at all, ordered the record to be amended in this respect, under stat. 9 G. 4, c. 15. *Moody & M.* 350. In an action against a sheriff for a false return to a *feri facias*, the declaration stated a judgment recovered by the plaintiff against J. B. for 30*l.* 10*s.* which were adjudged to him for his

damages, by him sustained, as well by occasion of his not performing certain promises and undertakings, &c.; and by the copy of the record produced it appeared that a remittitur was entered as to all the counts except the first, and the judgment was for not performing the promise and undertaking in that count mentioned: the court held the variance fatal; the plaintiff was bound to set out a judgment to warrant the *fi. fa.*, and he must do that correctly. 5 B. & C. 339. See 2 Str. 802. 2 Stark. N. P. C. 7. So, in an action against the marshal for an escape, where the declaration stated that the person who had escaped had put in bail before Mr. Justice Bayley, and rendered, and the recognizance-roll when produced stated that it was taken before the court at Westminster; the court held the variance to be fatal; for it was necessary to state before whom the recognizance was taken, to shew that the subsequent commitment was valid. 4 B. & C. 403. So, in an action for a false return to a writ of *feri facias* against bail, an allegation that the plaintiffs "by the judgment of the court recovered" against the bail, &c., is not proved by the production of the recognizance of bail and the *scire facias* roll, with an award of execution; for that is not a judgment to recover. 11 East, 516. So, in an action for a malicious prosecution, an allegation that the plaintiff was acquitted by a jury in the court of our Lord the King, before the King himself at Westminster before the chief justice, and discharged thereupon by the court, was holden not to be proved by a record stating the trial to have been at *nisi prius*, and the plaintiff to have been discharged by the court in banc. 2 Camp. 193, 11 East, 508.

A writ is never set out in pleading by way of description, so as to make a mere literal variance material; the statement usually is, that by a certain writ of our Lord the King, called —, the sheriff was commanded to do so and so, and if the writ produced in evidence support that statement in substance, it will be sufficient. Therefore, where in an action against a sheriff for an escape, the declaration stated that the plaintiffs sued out an attachment of privilege, by which said writ our said Lord the King commanded the defendants to attach S. F. &c., to answer the said plaintiffs of a plea of trespass upon the case "to the damage of the said plaintiffs of 30l." &c.: and the writ when produced was found to have omitted these latter words "to the damage" &c.: Best, C. J., held the variance to be immaterial. Ry. & M. 291. So, in an action for a false return, where the declaration set forth a *feri facias*, and a warrant to levy so much which the plaintiff had recovered against A.; and the warrant produced was to levy of the goods of A. so much, which the plaintiff had recovered against — (omitting the name :) the court held it to be no variance. 2 Str.

909. See 1 Camp. 15. 2 Id. 21; 2 Esp. 726, 727. So, in pleading an original writ returnable *coram domino rege ubicunque*, &c., the omission of *ubicunque* was holden not to be fatal. 1 T. R. 240 n. So, in pleading a *feri facias*, where it was stated that the sheriff was commanded to levy 80s. awarded to J. S. for his damages sustained by occasion of the detaining the debt, and by the writ produced it appeared that the 80s. were awarded to J. S. as well for his damages sustained by reason of detaining the debt, as for his costs, &c.: this was holden no variance, for costs (in the legal sense of the term) are included in the word damages. 9 East, 198. Where in an action for the escape of a person named Donner, the declaration stated the *litit* to have been against Donner and J. Doe, and the writ produced was against Donner and two others: Lord Mansfield held it to be well enough, the writ being sufficient to warrant the arrest. 1 T. R. 238 n. vide supra. In an action for bribery, where the declaration stated the precept to have been directed to the mayor only, and the precept produced at the trial was directed to the mayor and burgesses: it was holden sufficient. 1 T. R. 239 n. So, where the precept declared on was to the bailiffs and jurats, and the precept proved was to the bailiff (in the singular number) and jurats, it was holden good. 2 H. Bl. 113. So, where the declaration stated a *fi. fa.* as directed to A. B. and C. D., sheriff of Middlesex, and the writ when produced appeared to be directed to the sheriff of Middlesex generally, without mentioning the name; it was holden to be no variance. 2 Camp. 525. So, if the pleading state a *ca. sa.*, and the writ when produced appear to be an *alias ca. sa.*, it is not a material variance. Gilb. Ev. 38, 39. So, where in pleading a bill of Middlesex, only a few of the first words were stated, and then an &c. added, this was holden to be no variance from the bill of Middlesex produced in evidence. 1 T. R. 237 n. See 5 Esp. 133. But the statement in the pleading must be proved in substance by the writ produced in evidence: therefore, in an action against a sheriff on the stat. 8 Ann. c. 14, for removing goods under an execution without paying the rent to the landlord, where the declaration stated that the defendant took the goods by virtue and under pretence of a writ of *feri facias* sued out of the court of our Lord the King before the King himself, and the writ produced in evidence was a *fi. fa.* returnable in the Common Pleas, the variance was holden fatal. Ry. & M. 266. 4 B. & C. 657. So, in an action against an attorney for negligence in not having prosecuted the plaintiff's debtor to judgment, the return of the writ on which the debtor was arrested being laid to be in the 25th year (under a *videlicet*.) and the writ itself appearing to be returnable in the 24th year, the court held the variance to be fatal, and the plaintiff was

nonsuit. 1 T. R. 656. So, in an action on a bail bond, where the declaration stated that by the writ the sheriff was commanded to take "one Francis Jones by the name of John Jones," and the writ was to take "John *Jones," Lord Ellenborough, C. J., held the variance to be fatal. 2 Camp. 270.

An indictment for perjury committed in an answer to a bill in equity, professed to set out the substance and effect of the bill, and in doing so stated an agreement respecting "houses," and in the bill when produced it was "house," in the singular number: Abbott, C. J., held, that although the indictment did not profess to set out the tenor of the bill, yet as this was a difference in substance, the variance was fatal. Ry. & M. 97. But where such indictment stated that the prosecutor filed a bill against A., B. and C., and the bill when produced appeared to be against A., B., C. and D.: Abbott, C. J., held the variance to be immaterial, as the indictment did not profess to set out the title of the bill; if it did, the variance would have been fatal. Ry. & M. 101. In an action for libel, after stating an information filed by the Attorney-General in the Court of Chancery against Thomas Eamy, respecting some charity, stated the filing of the answer of the said Thomas Eamy; and to prove this latter allegation, it was holden sufficient to put in evidence a copy of the answer headed "The several answer of Thomas Eamy," &c. but signed "Thomas Amey." 2 Camp. 87.

In an action for an amercement, where the declaration stated the court to have been holden before the steward of the manor, and it appeared in evidence to have been holden before the deputy steward, the court held the variance to be fatal. 1 H. Bl. 162.

Where a statute is recited in pleading, a variance between the statute pleaded and the evidence will be fatal. See ante, p. 147, 148. And it makes no difference in this respect whether the statute be private or public; for if a party undertake to recite a public statute, and misrecite it, it is as fatal as in the case of a private statute. Plowd. 79. 84. Bro. Parl. 87. Cro. El. 236. Cro. Car. 282. 2 Mod. 99. See ante, p. 147. A trifling or immaterial variance, however, will not prejudice; 2 Bulst. 47. 51: as if an act say, "if a recovery be in *aliquibus curiis*," and it be recited "*in aliqua curia*," it is sufficient. R. Cro. Car. 523, and see ante, p. 147.

In actions *ex delicto*, the rule is not by any means so strict as in actions *ex contractu*. In the latter, a contract being an entire thing the whole cause of action stated must be proved as laid, except such parts as may be rejected as surplusage, within the rules already laid down: in the former, many circumstances of aggravation &c. are usually laid, which do not probably accord with the truth of the case, and need not

be proved at the trial; and, even as to the cause of action, if only a part of that which is laid be proved, and the part so proved be of itself a sufficient cause of action the residue not proved shall not hurt. Thus, in trespass for entering the plaintiff's house and expelling him therefrom, if the expulsion be not proved, the plaintiff may still recover for the entry. See 3 T. R. 292. So, in trespass for taking goods and converting them to his (the defendant's) use, if the conversion be not proved still the plaintiff may recover for the taking. See 3 T. R. 297. 3 Wils. 20. 2 Camp. 176 n. So, if a plaintiff declare that the defendant "composed and published, and caused and procured to be composed and published, *a certain libel of and concerning" &c.: the plaintiff shall recover if he prove that the defendant published the libel or caused it to be published, without proving that he composed it. So, in case for a false return to a *fi. fu.* against A. and B., where it was averred that A. and B. had goods within the bailiwick, and it appeared in evidence that B. alone had goods there, the court held this sufficient to support the allegation. 4 M. & S. 349. So, where the declaration alleged that the defendant maliciously caused the plaintiff to be arrested for 40*l.*, and detained him until he found bail; and it appeared at the trial that the defendant had not found bail, but had deposited the money with the sheriff: Lord Ellenborough held, that as the plaintiff had been detained, the action was maintainable, although the allegation of his having found bail were not proved. 1 Stark. 48. So, in an action on the case for a breach of warranty in selling unmerchantable goods, knowing them to be so, the court held that the plaintiff might recover without proving the *scienter*. 2 East, 446. See 1 Car. & P. 166. So, in an action *qui tam*, for using a trade without having served an apprenticeship. Lord Kenyon held, that the whole time laid in the declaration need not be proved, if it be averred that the defendant forfeited 40*s.* for every month. Peake, 57.

But a part of the facts laid, sufficient to constitute a cause of action, must be proved as laid: therefore, in trespass for breaking into a dwelling-house, where the evidence was of breaking an external rail fence, and trespassing on some leads adjoining the plaintiff's dwelling house, and used by him as an easement with it: Lord Tenderden, C. J., held the variance to be fatal. 3 Car. & P. 331. In case for maliciously causing plaintiff to be arrested on a charge of felony, where the declaration alleged that the defendant charged the plaintiff with a felony before the magistrate, but it appeared in evidence that the charge was of a tortious conversion of goods not amounting to felony: the variance was holden fatal. 1 Stark. 67. and see 3 Camp. 461. 3 Esp. 165. So, in actions for verbal slander, the words, or so much of them as will

constitute a cause of action, must be proved as laid. See 2 Barn. & Ald. 756. 7 Taunt. 205. 2 Esp. 491. and see post, Book IV., Chapter IX. Proof that the defendant spoke the words complained of, to a person, was holden not to maintain an allegation that he spoke of that person. 4 T. R. 217. So, a count for slanderous words spoken affirmatively, is not supported by proof that they were spoken by way of interrogation. 8 T. R. 150. So, in an action by an auctioneer for words said of him in reference to a sale by him of some fruit, the declaration stated that the defendant had said to the owner of the fruit, that the reason it had not brought higher prices was, that the plaintiff had told several persons in the auction room that *he himself* had three cargoes of fruit in the river; and the words proved were, that *there then were* three cargoes, &c.: this was holden to be a fatal variance. 6 Bing. 491. So, evidence of the improper stowing of the defendant's anchor, by reason of which it broke into another vessel and damaged the plaintiff's goods, will not support a count charging the injury to have been occasioned by the unskillful steerage of the defendant's ship. 5 Esp. 226, 228. and see 5 Taunt. 534. So, in an action for worrying the plaintiff's sheep, where the declaration alleged that the defendant's dog was accustomed to worry and bite sheep and lambs, and the evidence was that the dog was ferocious and mischievous, and had frequently attacked men: the court held that the evidence did not support the declaration. 1 Barn. & Ald. 620. 2 Stark. 212. So, in an action for an injury caused by fireworks, where the declaration charged the defendant (a schoolmaster) with having delivered them and causing and procuring them to be delivered to his pupil who used them; and it appeared in evidence that the fireworks had been delivered to the pupil by another person, without the authority or knowledge of the defendant: the variance was holden fatal, and the plaintiff nonsuit. 1 Stark. 421. Where the declaration stated that the defendant went before one B. C. Baron Waterpark of Waterfurk, and charged the plaintiff with felony; and the evidence was that he went before R. C. Baron Waterpark of Waterpark: it was holden a fatal variance: for this was a description of a name of dignity, and the evidence therefore disproved the allegation that he went before the person mentioned in the declaration. 2 Barn. & Ald. 756. So, if a public officer bring an action for injury done to him whilst in the execution of his office, and he misdescribe his office in the declaration, he shall be nonsuit. 1 Camp. 231. see 5 Esp. 70. So, if an action be brought for an injury done by or to a person in a particular character, it must be proved that the party sustained that character; see 4 T. R. 366. 1 Campb. 231. 1 Esp. 437. 1 New Rep. 196; unless it appear that the allegation

as to the character in which the party sues or is sued may be rejected as surplusage, and that the action is equally maintainable by or against him in his individual capacity. See 3 B. & C. 138 n. So, in trespass *quare clausum fregit*, case for a disturbance, or other possessory action, if the plaintiff, instead of declaring on his possession, set out his title, (although unnecessary to do so,) and fail in the proof of it, he shall be nonsuit. See ante, p. 93. 99. So, in an action by a landlord against a sheriff for taking goods without reserving a year's rent, if the plaintiff set forth the particulars of the demise, (which is unnecessary,) and do not prove them as laid, he shall be nonsuit. 1 T. R. 236 n. 2 Doug. 665. So, in an action by a landlord against his tenant, for double rent, or for negligently keeping his fire, if the declaration state a demise for years, and the evidence be of a lease from year to year, the variance is fatal. 2 Doug. 668, and n. Carth. 202. So, in an action for selling goods, which had been distrained for rent, before they were appraised, where the declaration stated the distress to have been for rent due to A., and the evidence was that the rent was due to B.: the court held that, as the defendant might have traversed the fact of the rent being due to A., that fact was material, and the variance fatal. 1 Bing. N. R. 162. So, wherever a contract is the foundation of an action *ex delicto* or on a statute, the contract must be prove as laid, in the same manner as in actions *ex contractu*. In an action for a penalty for a fraud in the measure of coals purchased by A. and B.: the contract proved was a purchase by A., B., and C. jointly, who agreed to *divide the quantity between them: the variance was holden fatal, although there was a separate delivery to A. and B. of their share. 5 Esp. 33. 109. So, in an action *qui tam* for insuring a particular lottery-ticket at 42/., where the evidence was that this sum was paid as premium for insuring that ticket and others, the variance was holden fatal. 1 Esp. 50. The variance, however, in all these cases must be substantial and material to be fatal; and therefore, in an indictment for perjury alleged to have been committed by the defendant in his evidence as a witness upon a trial, where it was alleged that the defendant had sworn that C. spit in D.'s face, and that he the (defendant) did not say, "Give it him, give it him!—it will go in one account;" and in evidence it appeared that he had sworn to both these statements but that they were not consecutive, as other matter intervened between them: Abbott C. J., held this not to be a variance, as the intervening matter did not vary the effect of the matter stated. Ry. & M. 252. So, in an action for libel, where the declaration alleged that whilst the plaintiff was vestry-clerk of the parish of A., certain prosecutions were carried on against J. B. and that, "in furtherance of such proceedings,

and to bring the same to a successful issue," certain sums of money of the parishioners of A. were applied to pay the expenses; the declaration set out the libel, as published of and concerning his conduct as vestry-clerk, and of and concerning "the matters aforesaid;" in evidence at the trial, it appeared that the money was applied, not whilst the prosecutions were proceeding, but after they were at an end: the court held that the variance was not material, for it was wholly immaterial to the defamatory character of the libel whether the money was applied before or after the prosecutions were terminated. 3 B. & C. 113. So, in an action for a malicious prosecution, where the declaration stated that the defendant charged the plaintiff, before a magistrate, with having feloniously stolen certain property, and thereupon obtained a warrant against him, and the evidence was that he laid the information before the magistrate as to the property being feloniously stolen, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen it. and thereupon obtained the warrant: it was holden, that the variance was not material; for stating to the magistrate that he suspected the plaintiff of the felony, was tantamount to charging him with the offence. 6 M. & S. 29. So, in an action for beating the plaintiff's cow, "by reason whereof" it died, and the evidence was that the defendant beat the cow, and thereby injured it so much that, to end its sufferings, the plaintiff killed it; the court held this sufficient after verdict. 4 D. & R. 202.

Customs must be proved as laid; any material variance between the custom laid and that proved, will be fatal. Ante, p. 131. On a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, the custom proved was that the lord should have the best beast *or good*, and the court held the variance fatal. 1 B. & P. 304 n. See 9 East, 185. So, where the declaration stated a custom in the parishioners of A., generally, to elect a curate, and the proof was of a custom in the *parishioners paying church rates; this was holden to be a fatal variance. 5 Bing. 316. So, evidence that the homage have been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation. 1 B. & P. 393. So, where the issue was whether by the custom of the manor the wife should have an estate in copyhold lands for her life, after the death of her husband; evidence that she was entitled to it *durante viduitate* was holden not to maintain the issue. Doct. Pl. 205. Dy. 192. 4 Co. 30 a. But an allegation of a custom of payment by the chapel wardens of A. to the church-wardens of B., has been holden to be supported by

evidence of a custom of payment to officers acting only for the township of B., not co-extensive with the parish of B., but who had always been described as the church-wardens of B.; 4 T. R. 669; for this, in substance, was a proof of the custom. See 10 East, 259. So, where a custom was alleged that such a one should have his freedom upon paying a reasonable fine, and the custom proved was that he should pay 6s. 8d., it was holden sufficient. 2 Str. 1070. see 4 T. R. 104.

A prescription also must be proved in substance as laid; therefore where issue was joined on a prescription for a several fishery in four places in a navigable river, and it appeared in evidence that the right extended to two of the places only; the variance was holden fatal, even although the trespass were committed in one of these two places. 1 Camp. 309. 313. So, a plea prescribing for a wright of common generally, is not supported by evidence of a right of common, paying one penny for it. See Cro. El. 563. So, a prescription for common in 100 acres is not proved by evidence of a right of common in 50. Id. 593. So, a prescription for common for all commonable cattle, is not proved by evidence of a right of common for sheep and horses only. Bul. N. P. 59. 3 Selw. N. P. 1119. So, where the right claimed was for the occupiers of a house to put up lines in a certain yard, and hang linen and clothes there to dry, and the proof was of a right to do so as to the linen and clothes of their own families only; the court held, that as the right claimed was larger than that proved, the evidence did not support the statement, and the plaintiff was accordingly nonsuit. 3 B. & Ad. 735. But if the party claim less than he is entitled to, 1 Taunt. 143, as if he claim common for sheep, and if it appear in evidence that he is entitled to common for sheep and cows, Cro. El. 722, it is sufficient. So, if there be a variance between the pleading and evidence as to the number of acres &c. by reason of which a right by prescription is claimed, it seems to be immaterial; therefore, where a declaration stated the plaintiff to be seised of sixty acres of meadow &c., and entitled, in respect of them, to a right of common; and the jury found a right of common in respect of thirty acres; it was holden sufficient. Palm. 269, Cro. Jac. 629. So, a right claimed in respect of a messuage and twenty acres, may be supported by evidence of a right in respect of a messuage and eighteen acres only. Cro. El. 531. So, a claim of common in respect of a messuage and land, may be supported by evidence of a right of common by reason of the party's possession of land only. 2 Barn. & Ald. 360.

As to the effect of a *scilicet*, see ante, p. 121.

As to the effect of particulars of the plaintiff's demand having been given: the plaintiff cannot give evidence of any matters not mentioned

in his bill of particulars, under any of the counts in his declaration to which his bill of particulars is applicable. See 2 Arch. Pr. C. P. [48.] 226. Nor can he, of course, give evidence of any items in it not warranted by the declaration. But for mere inaccuracies in it, by which the defendant could not have been misled or deceived, no objection can be taken, variances between the particulars and proof in such cases being deemed immaterial. See 2 Arch. Pr. C. P. 226. 8 Bing. 371. 411. 1 Dowl. 18.

Matter of Defence.] Deeds and other contracts must be stated truly in a plea; if put in issue, the slightest variance in substance between the deed or contract given in evidence, and that laid, will be fatal. The rule upon this subject is the same in pleas as in declarations. See ante, p. 330—336. Where a plea alleged that "A., by his writing, sold the aftermath of land to B.," the court held that this allegation was not proved by evidence that B. was the purchaser of the aftermath at an auction, held for the purpose of selling it under a statute enabling A. to sell by writing, and that A.'s agent wrote the name of B. in the printed catalogue as the purchaser, and that B. gave his promissory note for the price. 8 T. R. 151. So, where a plea stated that a select vestry was duly assembled, but in evidence it appeared that one of the vestrymen had not been summoned, nor did he attend: the court held that the evidence did not support the plea. 7 Bing. 305. So, where a plea justified a libel as true, which charged the plaintiff with cruelly beating his horse, and knocking out one of its eyes, and the evidence proved the cruel beating only: the court held the evidence did not sustain the plea. 1 Car. & P. 295. In replevin, the defendant avowed upon a contract for 110*l.* rent per annum, and at the trial proved a demise at 15*s.* per acre, amounting to 111*l.*: the variance was holden fatal. 4 Taunt. 320. Where, in trespass for taking a piano-forte, the defendant pleaded that it had been stolen from him by L.: Lord Lyndhurst, C. B., held, that any thing which might be given in evidence against L., if he were then on his trial for the felony, was admissible to prove this plea. 6 Car. & P. 677.

So, matters of record must be proved as laid; a variance between the record set out and that produced in evidence, will be fatal in a plea, in precisely the same manner and under the same circumstances as in a declaration. See ante, p. 336. 338.

So, customs and prescriptions in pleas must be proved as strictly as in declarations. See ante, p. 343, 344.

So, in fact, in all other instances, where the matter of a plea is put in issue, such parts of it as cannot be rejected as surplusage must be proved in substance as laid. See ante, p. 224, 225.

Matter of Replication, &c.] The rules as to variance between *pleading and evidence, which have just now been laid down with reference to declarations and pleas, are equally applicable to replications and other subsequent pleadings. Where a plaintiff, in his replication, pleaded an appearance to a *clausum fregit* sued out of the Common Pleas; evidence of an appearance to a *clausum fregit* issued out of Chancery, was holden not to support the replication. 2 New. Rep. 463. See also 3 B. & Ad. 735.

Matter not alleged, in what cases.] The general rule is, that nothing shall be given in evidence, which does not directly tend to the proof of the matter in issue. Thus, in an action for use and occupation, where it became material to prove that the rent was payable quarterly, the plaintiff in proof of it tendered evidence that all his other tenants paid their rents quarterly: Lord Kenyon, C. J., held, that it was clearly not evidence in that cause; and that it had recently been decided in a trial at bar, that evidence of the custom of one manor is no evidence of the customs of a manor adjoining. Peake, R., 130. In an action for negligence, the plaintiff cannot give evidence of any other act of negligence by the defendant or his servant, but that which caused the damage. 1 Car. & P. 70. In trespass for taking a piano forte, the defendant pleaded a justification that the piano was his, and had been stolen from him by A. B.; and at the trial, in evidence of the felonious intent, besides proving that A. B. hired the piano from him and immediately sold it, &c., he offered to prove that A. B. had also obtained other goods from another person, under similar circumstances: but Lord Lyndhurst, C. B., held, that the evidence could not be received. 6 Car. & P. 677. But where, in an action for a libel in a letter, which referred to an account of the same transaction contained in a newspaper, Garrow, B., held that the plaintiff had a right to have the account referred to, read from the newspaper. 1 Car. & P. 296. In an action against the captain of an Indiaman by the gunner's mate for causing him to be flogged, the plaintiff, in aggravation of damages, offered to prove that he was a person of considerable family and connections; but Abbott, C. J., held, that such evidence could not be received, unless it were first proved that the defendant at the time knew him to be so. 2 Stark. R. 516. A defendant, in an action for a libel contained in a newspaper report of a coroner's inquest, has been allowed by Abbott, C. J., under the general issue, to prove, in mitigation of damages, that the report was a correct one. Moody & M. 40. But a defendant in an action for libel will not, even in mitigation of damages, be allowed to give evidence of libels published of him by the plaintiff, but not connected with that which was the subject of the action: it would be allowing a kind of

set-off, of one libel against another. 3 B. & C. 113: In an action for defamation of a schoolmaster, in stating that his scholars were badly fed, had the itch, and were full of vermin, where the defendant pleaded in justification that the statement was true, Abbott, C. J., held that the plaintiff could not ask questions of the witnesses as to the food or treatment of boys in a certain other school, as compared with the school in question, but that he might give *general evidence of the treatment of boys at school, and shew that he treated them as well as they could be treated for the stipend he received with them. 1 Car. & P. 65: Also, it is a general rule that no evidence shall be admitted of character, unless the character of the party be immediately in issue. See 1 Camp. 207. 209 n. There are, however, some cases which seem exceptions to this rule, but which, when rightly considered, will be found not to be so. A plaintiff in an action for slander has been allowed to give evidence of his previous good character; 5 Esp. 13; but it must be recollected that this is one of the matters expressly alleged in the declaration; and in a subsequent case, Abbott, C. J., refused to allow it, even where a justification as to the truth of the libel was pleaded. Ry. & M. 305. A defendant in an action for a malicious prosecution has been allowed to give evidence of the general bad character of the plaintiff, after having first given evidence of circumstances of suspicion relative to the particular transaction which was the subject of the prosecution; 2 Esp. 720. See 2 Stark. 69; because this tended to the proof of the existence of probable cause for the prosecution, which formed a material part of the issue. A defendant in an action for a libel has been allowed to give, in mitigation of damages, evidence that the plaintiff at the time of the libel was generally suspected of being guilty of the practices imputed to him, and that his relations and acquaintances had ceased to visit him on that account; 2 Camp. 251. 1 M. & S. 284, but see 11 Price, 235; or to prove, it seems, the generally bad character of the plaintiff previously to the libel; but this is permitted merely in mitigation of damages, for what injury can the character of that man receive who was already a reprobate in character at the time of the libel? But the defendant shall not be permitted to prove the plaintiff guilty of the offence imputed to him by the libel, unless he have put it in issue by a justification. 2 Str. 1200. 2 Selw. N. P. 986 (n. 6.) So, in an action for criminal conversation, the defendant may prove in mitigation of damages, that the wife had been previously connected with other men; Bul. N. P. 27. 296. per Cur. 4 T. R. 651; or that she had made the first advances to him, and solicited the criminal intercourse; 1 Selw. N. P. 25. Per Kenyon, C. J., 2 Esp. 562; for what injury has the husband sustained by the loss of the society of a wife of such a char-

acter? So, in an action for seduction, similar evidence is received, for nearly the same reasons, 1 Camp. 460, and see 3 Id. 519. And when evidence is thus received of bad character, the party, of course, is allowed to adduce evidence to rebut it; and this distinction seems to be taken upon the subject, namely, if one party give evidence of the general bad character of another, the latter may answer it by evidence of general good character; 1 Camp. 460. see 1 Car. & P. 100; but if one party give in evidence particular instances of bad conduct on the part of another, the latter cannot answer it by evidence of general character but must confine his evidence to the disproof of the particular facts alleged by the other. 1 Camp. 460. In the cases above-mentioned, the character of the wife, daughter, &c. is substantially and in fact put in issue; and they are therefore not to be deemed exceptions to the general rule. The only case which can be fairly considered an exception *is this, namely, that where the attesting witness to a will &c. is dead, and any fraud is imputed to him in having attested it. evidence has been received as to his character. 1 Camp. 209 n. 210. 3 Esp. 284. 5 Bing. 435.

Where the pleading is allowed by law to be general, it is of course permitted to the party to support it, by giving the special matter in evidence: thus, in support of the common counts in assumpsit and debt, the plaintiff gives in evidence the particulars of the goods sold, the work done, the money expended, &c.: and even in this case the defendant may restrict the plaintiff in his evidence, by previously obtaining from him a bill of particulars of his demand; in which case the plaintiff will not be permitted to give evidence of any item not stated in such particulars. See 2 Arch. Pr. C. P. [47, 48], 224. In trover, though the conversion is stated generally, yet the particulars of it are given in evidence at the trial. So, in case for a disturbance, and other possessory actions, although the declaration do not state a title, yet the plaintiff will be obliged to prove a good title to the easement, common, &c. claimed, at the trial. Ante, p. 93. So, where a plaintiff pleads a matter which was not lawful at common law, but to the validity of which a statute makes certain circumstances necessary: we have seen (ante, p. 93, 94) that it is not necessary to allege these circumstances in pleading; but they must be proved at the trial, if the matter be put in issue. So, when a defendant pleads the general issue, he may give in evidence every particular fact and circumstance which tend directly to disprove the facts put in issue by it. So, in some cases at common law, (as in ejectment,) and in some by statute, (as in actions against justices of peace, constables, officers of excise, &c.,) instead of pleading specially matter which confesses and avoids the cause of action

stated in the declaration, the defendant may plead the general issue and give the special matter in evidence. But all these are rather illustrations of, than exceptions to, the rule above-mentioned, namely, that nothing shall be given in evidence which does not directly tend to the proof of the matter in issue.

Special Damage.] Special damage, when laid, is either essential to the maintenance of the action, or it is laid merely by way of aggravation; if the former, it, or so much of it as proves some damage received must be proved, otherwise the plaintiff will be nonsuit; if the latter, failing to prove it will merely have the effect of preventing the plaintiff from recovering additional damages in respect of it. We have seen (ante, p. 156) the particularity with which such special damage must be stated; and it must be proved in substance as laid. Thus, in an action by a woman for words, *per quod* she lost her marriage with J. S. *et alias personis*, Lord Holt, C. J. said, that he would not suffer the plaintiff to give in evidence a loss of marriage with any other person but J. S. 1 Salk. 287. In an action by a baker, for slander of him in his trade, where it was laid as special damage that several persons named had caused to buy his bread, a witness on behalf of the plaintiff, and who kept a shop at which his bread was sold, proved that the persons so named, whom he was in the habit of serving with the plaintiff's bread, *refused to take it any longer; but being asked what reasons they assigned for their refusal, Best, C. J., held, that what they stated to the witness was not evidence; they might themselves have been called as witnesses, when they could have stated on their oaths their reasons for not continuing to take the plaintiff's bread. 2 Car. & P. 201.

Amendment, in Cases of Variance.] By stat. 9 Geo. 4, c. 15, reciting that "Great expense is often incurred, and delay and failure of justice, takes place, by reason of variance between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time; it is enacted, " That it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record, on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be

forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such court or judge shall think reasonable ; and thereupon the trial shall proceed as if no such variance had appeared ; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the postea, and returned together with the record ; and thereupon the papers, rolls and other records of the court, from which such record issued, shall be amended accordingly." Where a bill of exchange was stated in the declaration to be drawn by J. S. to his own order, but when produced in evidence it appeared to be drawn in favour of another person, the judge ordered the record to be amended, and the court afterwards held that he had done rightly. *Parks v. Edge*, 1 Crompt. & M. 429. and see 4 Car. & P. 24. 22. 79. So, where a judgment was stated to have been recovered in the Court of King's Bench, and when produced at the trial it appeared to be a judgment of the Court of Common Pleas, Lord Tenterden, C. J., ordered the *nisi prius* record to be amended according to the truth ; he said he had no doubt the statute warranted the amendment. *Moody & M.* 359. So, in an action for not obeying a subpoena, where the declaration stated that a copy of the writ was left with the defendant, and it appeared in evidence that copy served was directed to the defendant and John Doe, whereas the original was directed to the defendant and two other witnesses by name : Lord Tenterden, at the trial, ordered the *nisi prius* record to be amended, by inserting of "a copy of the said writ of subpoena," the words "a copy of so much of the said writ of subpoena as related to the said defendant ; and the Court of Common Pleas held that the amendment was fully warranted by the statute ; for as the declaration stated that a copy of *the subpoena was served, it was the same as if the writ were set out in the declaration, in which case, of course, a variance between it and the writ produced in evidence would be amendable under the statute. 8 Bing. 224. So, where the declaration stated a contract to pay by bills due *before* the 15th of February, and the written contract was, to pay by bills due *by* the 15th of February : this was holden to be amendable within the statute, although the declaration did not profess to set out any contract in writing. 4 B. & Ad. 479. But where, in replevin, the avowries stated a holding on certain terms, but by the lease, when produced in evidence it appeared that the holding was on different terms : Park, J., held that he had no authority by this statute to order an amendment, because the avowries did not profess to set out or recite the lease, and the act of parliament only applied to cases where the written instrument is professed to be set out or recited in the pleading. 3 Car. & P. 594. So, in an action for maliciously holding to bail, where the declaration stated

a judgment of nonsuit in the original action, and the evidence was of a rule to discontinuance only : Lord Tenterden, C. J., held that he could not remedy it by an amendment under this act, because this was not a mere mistake in setting out a written instrument, but was an allegation of a matter totally different. *Moody & M.* 253.

And by stat. 3 & 4 W. 4, c. 42, s. 23, reciting that "Great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is to be had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter of writing or in print produced in evidence and the record ; and that it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause : it is therefore enacted, that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings where it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable ; and in case such variance shall be in some particular or particulars, in the judgment of such court or judge, not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable ; and after any such amendment ; the trial shall

proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at *nisi prius* or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party, who is dissatisfied with the decision of such judge at *nisi prius*, sheriff or other officer, respecting his allowance of such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet." Under this act it has been holden, that where the declaration stated a promise to "pay," and the evidence was of a promise to "guarantee," the *nisi prius* record might be amended by substituting the one word for the other. 1 Ad. & E. 61.

If the judge at *nisi prius* refuse to amend under either of these acts his decision in this respect will be final, and the court will not afterwards allow the propriety of it to be discussed before them. See 1 Ad. & E. 750.

Where the plaintiff declared upon his possession of a mill, and that by reason thereof he had a right to a certain watercourse; and the evidence proved no right in respect to the mill, but a right in the plaintiff, before the mill was built, as occupiers in the land: the court held this to be a variance, which could not be amended under stat. 3 & 4 W. 4, c. 42, s. 23; it was in a matter material to the merits of the case, and the defendant, who came prepared to dispute the right in respect of the mill only, would be prejudiced in the conduct of his defence by it. *Frankum v. Earl of Falmouth et al.* 2 Ad. & E. 452.

SECT. II.

The Manner of proving the Matters put in Issue.

Evidence may be classed under three heads: Admissions, Presumptions, and proofs; each of which it may be necessary to consider with some minuteness.

Admissions.] An admission of a fact by either party, renders it unnecessary for his adversary to prove it. See Gilb. Ev. 137.

The highest species of admission is that which appears upon record; and it is conclusive against the party making it. If a defendant confess and avoid the count by his plea, he admits every fact stated in the count; if a plaintiff by his replication confess and avoid the plea, he admits every fact stated in the plea. So, if a defendant plead in abatement or bar, he admits that the court has *jurisdiction of the action: if he plead in abatement, he admits that he has no grounds for pleading any other plea in abatement precedent to it in the order for pleading; see ante, p. 283; or if he plead in bar, he admits that he has no grounds for pleading in abatement. In assumpsit by an administrator upon promises to the intestate, the defendant, by pleading the general issue, was holden to be precluded from objecting to the letters of administration, as not being properly stamped; for, by this plea, he admitted that the plaintiff was administrator. 2 M. & S. 553. And now, by Reg. Pl. 11. 4 W. 4, l. s. 21, "in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied." So, if a defendant allow judgment to pass against him by default, this is an admission of every material allegation in the declaration. Therefore in an action upon a bond against a surety, conditioned for the payment of money within a certain time after notice, and notice was accordingly averred, and a breach stated, it was holden that the defendant, by allowing judgment to go by default, had admitted the notice, as well as the execution of the bond, &c.; although it would probably be otherwise if the averment of notice and the breach had been contained in a suggestion under stat. 8 & 9 W. 3, c. 11, s. 8, and not embodied in the declaration. 3 Car. & P. 608. and see 2 Camp. 121. But an admission on the record cannot be made use of in proof of other issues in the same action; as for instance, if a defendant plead the general issue and a special plea, and the special plea be holden bad on demurrer, the plaintiff will not be allowed to make use of any admission in the special plea, as proof of his case under the general issue. 5 Car. & P. 98. 247.

Similar to this is the effect of a payment of money into court. By paying money into court, the defendant acknowledges that the contract or other cause of action is as described in the declaration; and all that remains for the plaintiff to prove, is the amount of damages. See more

particularly on this subject, 2 Arch. Pr. C. P. [42] 202. and see 2 Barn. & Ald. 116. 2 Bing. 277. 7 Taunt. 460. 3 Taunt. 95.

The next in order is an admission upon oath of the party: such as, for instance, his answer to a bill in equity, see 3 Camp. 115. Penke R. 203. and post, Ch. 2. s. 2, or his depositions before commissioners of bankrupt, see 4 Camp. 10. 1 Camp. 30. 2 Stark. 276. 7 B. & C. 623, or his affidavit. Gilb. Ev. 51. 56. 7 Taunt. 577. 4 Bing. 623. But it may be doubted how far such admissions, when made under compulsion, such as an answer to a bill in equity, or an examination before commissioners of bankrupt, are evidence of an account stated. 7 B. & C. 623.

Fourthly, the admission of the party, either in writing or by parol. Thus, if any thing be admitted by a deed to which he is a party, the deed may be given in evidence against him, or against any person claiming under him. See Stark. 43. 1 Camp. 367. 2 B. & B. 12. and see ante, p. 205. Where a person who had been mortgagee of some premises, took a conveyance of them from the assignee of the mortgagor, in which they were described as unincumbered; it was holden that this conveyance was evidence against him, of the mortgage having been paid off. 2 Stark. 52. So, a deed of grant to a corporation by a particular name, is evidence, as against persons claiming under the grantor, of the corporation being known by that name at the time. 8 East, 487. and see 2 East, 487. So, in an action on stat. 8 Ann. c. 9. against the master of an apprentice, it was holden that an allegation that "A. B. by a certain indenture, &c. put himself apprentice to the defendant," &c., might be proved by the production of that part of the indenture executed by the defendant, in which it was recited that A. B. had put himself apprentice &c. 5 T. R. 465. So, when one deed is recited in another, this is an admission of the recited deed by all parties to the deed reciting it, and may be given in evidence as such against them and all persons claiming under them. Gilb. Ev. 98. So, a notice that a partnership is dissolved, signed by the parties, for the purpose of being inserted in the Gazette, was holden to be sufficient evidence of the dissolution for all purposes against the parties signing it, although the partnership was constituted by deed, and consequently must have been dissolved by deed. 4 Camp. 373. 1 Stark. 181. So, where matter alleged as inducement in a declaration in an action for libel was admitted and recognized by the libel itself, that was deemed sufficient proof of it. 3 Bing. 432. So, return made of the sale and delivery of corn, by the seller, is evidence against him of such sale and delivery; but it is not conclusive evidence that the sale and delivery were unconditional, nor does it in any manner preclude the seller from showing the conditions

of such sale and delivery. 1 Car. & P. 593. So, a party's receipt is good evidence as an acknowledgment of a payment; 1 Camp. 392. see 2 Stark. 30, although it is not conclusive evidence, 2 T. R. 366, if it can be shown that it originated in some imposition practised upon the party who gave it. 1 Camp. 392. Where in an action by two co-trustees for money had and received to their use, the defendant gave in evidence a receipt for the money by one of them: this was holden not to be conclusive, and the plaintiffs were allowed to give evidence that the giving of the receipt was a fraudulent transaction, and that in fact no money had been paid. 8 B. & C. 421. So, if the holder of a bill write a receipt upon it, when it is taken up by an indorser, this will not prevent an action being maintained upon it against the acceptor, drawer, or any previous indorser; but the receipt may be explained by evidence, so as to shew the acceptor &c. still liable notwithstanding. See 8 B. & Ad. 313. Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents: it was holden that although such an acknowledgment in writing could not be given in evidence *per se*, in respect of the cash items amounting to above 40s. in each page, for want of receipt stamps, yet that it was competent to the plaintiff to prove that upon calling over each article to the defendant, he admitted that he had received the same; and that the witness might refresh his memory by referring to the accounts. 1 East, 469. So, where the party in a letter dated the 30th March, showed that he was then a shareholder in a particular company, this was holden to be good evidence of that fact, although the books of the company contained an entry *of a sale of his shares to a purchaser on the 28th March. 9 B. & C. 356. So, where the defendant, a prisoner, wrote to the town agent of the plaintiff's attorney, desiring that a confidential clerk might be sent to him, with whom he might communicate on the subject of the plaintiff's claim, and a clerk was accordingly sent, to whom he offered a composition of 10s. in the pound, and with a view to that composition admitted the debt to be 817.: this admission was holden good evidence of the debt and its amount. 5 Car. & P. 436. and see *id.* 437. So, in an action on a warranty of a horse, the only evidence of the warranty was a subsequent letter of the plaintiff to the defendant, in which he wrote thus: "you will remember that you represented the horse to me as a five-year old" &c., and the answer of the defendant "the horse is as I represented him;" Best, C. J., left it to the jury to say whether they believed this to have taken place at the time of the sale, for if so it was a warranty; and the jury found a verdict for the plaintiff. 2 Car. & P.

241. Where the defendant sold goods to the plaintiff in 1825, and the plaintiff sold goods to the defendant in 1830; the plaintiff brought his action for the latter goods in 1833, to which the defendant pleaded a set off of the former goods, and the plaintiff replied the statute of limitations: at the trial before the sheriff, the defendant proposed to give evidence of a conversation between him and the plaintiff, relative to the plaintiff's debt to him, at the time of the sale of the goods in 1830, but the under-sheriff rejected the evidence, on the ground that the set-off was barred by the statute of limitations; the court however held that the evidence ought to have been received, as it might have shown that the goods sold in 1830, were as a payment for those sold in 1825, and so would be a bar to the action, and they therefore granted a new trial. 1 Bing. N. C. 441. In an ejectment by a landlord against his tenant for a forfeiture, evidence was received of a previous acknowledgment by the lessor of the plaintiff that he had assigned his interest in the premises to another. 2 Stark. 230. So, in an action on a bill of exchange, evidence being given of an admission by the plaintiff that he had no interest whatever in the suit, the plaintiff was nonsuit. MS. M. 1814. So, in an action for breach of promise of marriage, an admission by the defendant to the father of the plaintiff, that he had pledged himself to marry his daughter, is good evidence. See 1 Stark. 82. So, an acknowledgment of the debt by the defendant, may be given in evidence; and it is in general conclusive. Where the defendant admitted a debt to be due, but nothing was said as to the amount, Abbott, C. J., held that the plaintiff was entitled to nominal damages. 2 Car. & P. 109. Where he admitted a debt, without stating the amount, but said that he had been arrested for it, Abbott, C. J., directed a verdict for 10/., that being the lowest sum for which a party could at the time be holden to bail. 2 Car. & P. 341. But when he admitted a debt on one account, without mentioning the amount, but it appeared also that the other party was indebted to him on another account, and there was no evidence on which side the balance lay: Lord Tenterden, C. J., held that the plaintiff was not entitled even to nominal damages, and nonsuit him. Moody & M. 183. Where after action brought on a charter party, the defendants offered a specific sum to settle the action, and being pressed to increase the offer, refused to do so, saying they should lose enough by the charter-party as it was: Lord Tenterden, C. J., held, that as nothing was said of the offer being made without prejudice, it was good *prima facie* evidence of the defendant's liability, and receivable as such. Moody & M. 446. Where however the party's admission relates to the contents of a written instrument, some difference of opinion exists as to whether evidence of the admission should be received, unless some

satisfactory reason were first given for the non-production of the instrument. Where a witness was asked whether the opposite party had not said that an interest in a certain patent had not been assigned by deed to D., Lord Tenterden, C. J., held clearly that the question could not be asked, without the production of the instrument on an account of its non production: and his lordship said, "I give my opinion distinctly, in order that it may be reviewed by a bill of exceptions, or in any other mode counsel may think proper." Ry. & M. 187. But in a subsequent case, where a witness was asked whether he had not heard the defendant say that S. had agreed to give 14,000*l.* for a certain estate, and the question was objected to, on the ground of its relating to the contents of a written instrument, J. Parke, J. overruled the objection, saying, that what a party says is evidence against him, whether it relate to the contents of a written paper or any thing else. 5 Car. & P. 542. Admissions however are in general construed strictly, and not extended by construction, see 1 Car. & P. 22, particularly when obtained by compulsion, as upon an examination before commissioners of bankruptcy, see 7 B. & C. 623, or the like. And in all cases of admission, the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him, not merely as evidence that he made such counter-claim, but as admissible evidence of the matter he thus alleged in his discharge. 5 Taunt. 245. And therefore, if in the examination or cross examination of a witness, he deposes to certain expressions being used by a party to the cause, the counsel for that party is entitled to cross examine or re-examine the witness as to the whole of the conversation in which the expressions occurred. 2 Brod. & B. 294, Queen's case.

And lastly, of admissions by implication. If an assertion be made in the presence of a party, relative to a fact within his knowledge, and he assent to it or do not contradict it, it may fairly be deemed equivalent to his admission of the matter asserted, particularly if the assertion be made by the opposite party or his known agent. But where in an action for an assault, it was proposed on the part of the defendant to give in evidence what the magistrate said when the parties were before him, Best, C. J. refused to receive the evidence; he said he would receive it if it had elicited any answer from the plaintiff, or he would receive evidence of any thing said by the defendant to the plaintiff, but not what was said to him by a third person. 2 Car. & P. 193. So, if the occupier of a house submits to a distress for rent, stated in the notice of distress to be due from him as tenant of the distrainor, this is an

*acknowledgment of the tenancy. 3 Camp. 372. So, where it appeared that the defendant built a cottage on a piece of waste land at the side of a road, and lived in it afterwards for thirty years without paying rent; at the end of that time, the owner of the land at each side of the road demanded of him 6*l.* rent, and he paid it, and afterwards paid the like rent on two occasions: in ejectment by the owner, to recover possession of the cottage from the defendant, this was holden conclusive evidence that the former occupation of the defendant was by permission of the owner, and that his entry therefore was not barred by the statute of limitations. 3 B. & C. 413. So, if notice to quit be personally served on the tenant in possession, and he makes no objection to it, this is an implied admission that the tenancy commenced at the season of the year when the notice to quit expired. 2 Camp. 647. So, where a tradesman makes out his bill against A., and afterwards brings an action for the goods or work against B., the bill may be given in evidence against him as an implied admission that the goods or work were furnished or done on the credit of A., and not of B., unless the plaintiff can show, by satisfactory evidence, that the bill was made out against A. by mistake or the like. See 6 Car. & P. 241. So if, at a meeting before the commissioners of bankrupt, the bankrupt object to several of the items of the petitioning creditor's account, which were accordingly struck out; and upon then computing the balance due to the petitioning creditor, it was found to be 160*l.*: this was holden an implied admission upon the part of the bankrupt of a debt due to the petitioning creditor to that amount. 2 M. & S. 265. But merely proving a debt under a commission of bankrupt, is no admission of the petitioning creditor's debt, or of the validity of the commission in other respects. 16 East, 191.

Too much reliance, however, should not be placed on admissions by parol or by implication; they may have originated in a lapse of memory or a foolish boasting in the one case, or from inadvertance in the other, and it would be wrong therefore to conclude the parties by them. Those in writing are of a higher nature, because made very probably with more premeditation; and if by deed or record, or upon oath, they are conclusive.

And it is no matter whether the party who makes the admissions be the person actually interested or not; it is sufficient if he be party to the record. Thus, it has been holden that a defendant may give in evidence the declarations or admissions of the plaintiff on the record, to defeat the action, although such plaintiff appear to be only a trustee for a third person. 7 T. R. 663. Where an infant sues by guardian however, the admissions of the guardian are not evidence against the

infant; 2 Stark. 366. Gilb. Ev. 50. see 1 Str. 548, cont.; at least, not any admissions before action brought. See Ry. & M. 106. So, where in an action by assignees of a bankrupt, it was proposed on the part of the defendant to give in evidence an admission made by one of the plaintiffs, before he was appointed assignee, Abbott, C. J. refused to receive the evidence, saying, "what the assignees say in their own persons, does not affect this case; you cannot confound plaintiffs of this sort, with plaintiffs in their own character. Moody & M. 51.

*On the other hand, the admissions of the person actually interested, are evidence, although he be not a party on the record. Thus, in an action by the master of a ship for freight, the declarations of the owner for whose benefit the action is brought, are evidence for the defendant. 3 Camp. 465, and see 1 Wils. 257. 4 Camp. 92. So, in an action brought against the sheriff for a false return to a *fi. fa.* where the defence rested on the validity of a commission of bankrupt, and it appeared that the assignees were the real defendants; a declaration by one of them who was the petitioning creditor, made subsequently to the suing out of the commission, that the bankrupt did not owe him 100*l.*, is admissible evidence on the part of the plaintiff. 4 Camp. 36. So, where A. deposited with B. a sum of money to distribute among A.'s creditors; in an action by C. (a creditor) against B. for the amount of his portion, the declaration of A. was admitted as evidence that C. was a creditor to a certain amount. 1 Stark. 372. So, where A. deposited with B. a deed belonging to C. but on which A. had a lien, in trover for it afterwards by A. against B., B. having refused to return it to A., alleging that he held it for C. and at his request, an admission by C. was holden good evidence for A. 1 Bing. 45. So, in an action against the sheriff, who was indemnified by a third person, Lord Mansfield, C. J. allowed the declarations of such third person to be given in evidence against the sheriff. *Dyke v. Aldridge*, 7 T. R. 665, *cit.*

And the admissions of one of two partners are evidence against both See 1 Stark. 81, 161. Peake R. 23. 70. 6 Car. & P. 228. Even where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone; this declaration was holden evidence against all the partners, to defeat an action brought by them jointly on such contract. 1 M. & S. 249, see 1 Holt. 141. So, where an action was brought against two partners, and one having pleaded his bankruptcy, a *nolle prosequi* was entered as to him: it was holden that an admission by him even after his bankruptcy but before his certificate, was good evidence for the plaintiff, upon the trial of the action as against the other partner. Peake R. 266. So, in an action against

some of several members of a public company, where the non-joinder of A. and others was pleaded in abatement, the admission of A. that he was a member of the company, was holden good evidence for the defendants of that fact. *Moody & M.* 45. So, where two were jointly sued in covenant, the affidavit of one was received in evidence against both: against the one who made it, as conclusive evidence; and against the other, as evidence to be left to the jury. *Gilb. Ev.* 56. And the same in other actions, where the interest of two or more jointly suing or sued, is joint and not several. But where the interests are several, or where the parties are tenants in common, or *quasi* so, as in the case of part-owners of a ship, see 1 *Stark. R.* 84, the admissions of one do not bind the other. In trespass, the admission of one defendant is not receivable in evidence to prove the others to be co-trespassers; but if they be established as co-trespassers by other evidence, then *the declaration of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object. Per Lord Ellenborough, C. J., 11 *East*, 585, and see 2 *Car. & P.* 232. The latter part of this proposition has been doubted; see 1 *Phil. Ev.* 94; but it seems clear that if such an admission inculcate the party making it, it may be received in evidence against him; and in that case, as the jury must assess the damages jointly against all, all must be affected by the evidence. But where in an action against four for negligence, three pleaded the general issue, and one allowed judgment to pass against him by default, *Tindal*, C. J. held that the account given of the matter by the defendant who allowed judgment to go by default, could not be received in evidence against the others. *Moody & M.* 501.

And not only the admission of a man or his partner, but also in some cases the admission of his known and accredited agent, is evidence against him. Thus, letters written by an agent in making a contract, and which form part of the *res gesta*, are admissible in evidence against the principal. 4 *Taunt.* 511. So, the admissions or declarations of a sub-sheriff, 1 *L. Raym.* 190, or of a sheriff's officer, with reference to any part of his conduct for which the sheriff is answerable, 1 *Camp.* 389. & n., are evidence against the sheriff; but it is only when the admissions of an under-sheriff &c., either accompany some official act, or tend to charge himself (he being in fact the real party to the cause) that they can be received in evidence against the sheriff. 4 *B. & Ad.* 541. So, if A. refer B. for information upon a particular subject to C.; what C. says concerning it, when applied to by B. or his agent, has been holden to be evidence for B. in an action against A. 1 *Camp.* 364. 366. n. 3 *Car. & P.* 522. But the letters of an agent to his prin-

cipal, in which he is rendering him an account of business he has done for him, cannot be given in evidence against the principal. *Id.* See 2 Stark. 275. So letters written to a party assured, by his agent or correspondent on the continent, are not admissible as evidence against him. 4 Taunt. 662. 505. But where an agent abroad was entrusted by the defendants to obtain payment of certain bills of exchange drawn by a trader in this country, and the agent in his letters to the defendants stated that he had received payment accordingly, and the defendants in their answer directed him to remit them the amount in government bills: in an action by the assignees of the trader (who had become bankrupt) to recover this money from the defendants, as received by their agent; it was holden that the agent's letter, coupled with that of the defendant's in answer, was good evidence to prove the receipt of the money by the agent. 5 Bing. 58. But the admission of the agent must appear to be within the scope of his authority, in order to be evidence against his principal; and therefore where the defendant told the plaintiff that L. would remit certain money to him; the letter of L., in which he inclosed the money to the plaintiff, was not allowed to be given in evidence against the defendant, as containing some admission relative to the employment of the plaintiff by the defendant. 6 Car. & P. *669. So, an admission by the defendant's shopman, relative to a matter not within the ordinary course of the defendant's business, was holden not to be evidence against his master. 8 Bing. 451. But where an alteration was made in the plaintiff's banking pass-book at his banker's, and on the plaintiff calling, and asking a clerk in the banking house the reason of making the alteration, the answer the clerk made was holden good evidence against the banker, in an action against him by the plaintiff. 1 Car. & P. 60. In an action for breach of promise of marriage, the letters of the lady's father to the defendant, containing false representations as to the lady's situation, &c., were allowed to be given in evidence for the defendant; 1 Car. & P. 546; but what the father said to a third person, who communicated it to the defendant, was holden not to be admissible. *Id.* In an action against a corporation for negligently pulling down a house belonging to them, whereby the plaintiff had sustained injury, a letter to the plaintiff respecting the pulling down of the house, written by the surveyor of the corporation, who had the management of their buildings, was holden evidence against the defendants. 3 Car. & P. 363. Also, where attorneys act merely as agents, their admissions are receivable in evidence against their clients in the same cases as those of ordinary agents: and therefore where the plaintiff's attorney, before action brought, wrote two letters to the defendant demanding payment of a certain debt, and re-

ceiving no answers then wrote to the defendant's attorney, who answered the letter, and paid 200*l.* on account; the plaintiff's attorney afterwards wrote for the balance to the defendant's attorney, who answered the letter and promised payment: Abbott C. J. held that these letters of the defendant's attorney were evidence against his client; at the time of the first letter he was clearly the defendant's agent, and it must be presumed that he continued so at the time he wrote the letter promising payment. 3 Car. & P. 380. So, any admission of an attorney in a cause, accompanying an act done by him in that cause, will be evidence against his client. And therefore, in an action against the defendants, as joint owners of the ship *Arundel*, a letter of their attorney, undertaking to appear for them, and describing them as joint owners of the ship *Arundel*, was holden by Lord Ellenborough C. J. good *prima facie* evidence of the joint ownership. 4 Camp. 133. But where the admission of an attorney does not accompany any act done, 1 Taunt. 398, or if it occur merely in the course of casual conversation, 2 Stark. 239, or before action brought, 4 B. & Ald. 339, and see 6 Car. & P. 690, it cannot be given in evidence against the client, without proof that the client gave him authority to make it. But where the admissions of an attorney in a cause are evidence against his client, an admission made by his managing clerk who had the sole management of the cause would, it seems, be equally evidence against the client. 5 Car. & P. 406.

So, where attorneys make written admissions in a cause, of facts not disputed, (and which is a very usual practice, adopted generally in order to prevent the expense of bringing up witnesses who perhaps reside at a distance,) such admissions are binding upon *the client, and are conclusive evidence of the facts admitted. See 1 Camp. 140. And the same, with respect to admissions made under a judge's order &c., in pursuance of R. G. H. 2 W. 4, s. 6, 7, and R. G. H. 4 W. 4. s. 20. And upon a second trial of a cause, after a new trial granted, Tindal, C. J. held that written admissions, which had been made by the attorneys of the parties for the purposes of the former trial, might be given in evidence at the new trial; if a party wish to withdraw such an admission, he should take out a summons before a judge, to obtain permission to do so: 5 Car. & P. 385.

And even the admissions of a wife, in cases where she is to be considered the agent of her husband, are evidence against him. Thus, where it appeared that she used to transact the business at home, and purchase the articles used in the trade, her admission as to the state of the accounts between her husband and the plaintiff, who supplied her with goods to be used in the trade, were holden to be evidence against

the husband. 2 Stark. 204. 1 Holt, 501. 1 Bing. 199. So, in an action against a husband for goods supplied to his wife while he occasionally visited her, a letter written by the wife acknowledging the debt within six years, was received as evidence to take the case out of the statute of limitations; Lord Ellenborough holding that she should be deemed her husband's agent, with reference to the goods so furnished to her. 1 Camp. 394. and see 1 Str. 527. But it is only where she can be considered as acting as his agent, that her admissions can affect him: therefore, in an action by the husband for wages due to the wife, her admission of the receipt of the money is no evidence against him. 2 Str. 1094. see 4 Camp. 92. 6 East. 188. Even in an action by husband and wife in right of the wife as executrix, it was holden that declarations by the wife could not be given in evidence by the defendant. 6 T. R. 680. But in an action against a man as administrator of his late wife, for money lent to her *dum sola*, it was holden by Lord Tenterden, C. J., that admissions of the debt made by the wife during coverture, were admissible in evidence, for the defendant was sued as administrator, and not as husband. Moody & R. 140.

And the admission is evidence, not only against the party who made it, but also against all persons claiming through or under him. See 9 Bing. 41. Therefore an admission made by the holder of a bill of exchange or promissory note, whilst such bill or note is in his possession, 4 D. & R. 730. 2 Bing. 269, is admissible as evidence against any person claiming through or under him, and identified with him in interest, as for instance, any person to whom he has indorsed it without value, or after it was due; 1 B. & Ad. 80. Ry. & M. 212. 2 Car. & P. 8; but not as against a person to whom it was indorsed for value before it became due; for he does not claim by the title of the indorser, but has a title of his own as indorsee, and therefore he ought not to be affected by the declarations of the indorser. 1 B. & Ad. 80. see 1 Car. & P. 148. 232. 230. Ry. & M. 127. Where a plaintiff claimed a certain close, as part of his estate, and for the defendant it was contended that it was part of the waste of an adjoining manor, the defendant was allowed to call the son of a former proprietor of the same estate to prove declarations of his father, at a time when he was proprietor, that he had but a right of common upon the close in question, and that he did not claim it as any part of his estate. 1 Ad. & E. 114. and see 1 Bing. N. C. 430. So, in an action by a vicar in right of his vicarage, a letter of a former vicar upon the subject was holden by Patterson, J., to be admissible in evidence against him. 6 Car. & P. 359. So, where A. purchased lands and died, and his widow afterwards occupied them about twenty years until her death, and it became

a question whether she so occupied them adversely, so as to give a title to her heir under the statute of limitations, or whether the lands belonged to the heir at law of A. : the latter was allowed to give in evidence declarations by the widow, during her occupancy, that she was entitled for her life only, and that after her death the lands would go to the heir at law of A. 5 B. & Ald. 228. But where evidence of what a testator had said, was tendered for the purpose of invalidating his will, the court held that it was not admissible. 5 Bing. 435. So, where A. made a voluntary settlement of an estate upon his wife after marriage, and afterwards in consideration of money to be advanced to him conveyed the property to B. in trust to sell, and died : it was holden that B. could not give evidence of admissions by A., made subsequently to the settlement, for the purpose of showing that money had actually been advanced by him to A. on account of the property, and of thereby invalidating the settlement. 1 Ad. & E. 733. So, where the letters of a former owner of certain lands were tendered in evidence by a defendant, but it was not proved, nor did it otherwise appear that the plaintiff claimed the lands through or under the writer, the court held that they were not admissible. 2 Brod. & B. 12.

In trover for goods distrained, the question being whether the defendant or one John Brown was landlord, and had a right to distrain, the plaintiff proved that he had theretofore paid his rent to J. B. ; the defendant then tendered in evidence certain accounts of J. B., in which he accounted with the defendant for those rents ; but the court held, that as it did not appear that J. B. was identified in interest with the plaintiff, his declaration or accounts were not evidence against him ; the defendant should have called J. B. as a witness. *Spargo v. Brown*, 9 B. & C. 935.

In all other cases, the declarations or admissions of third persons are not in general evidence ; they should be called as witnesses, in order that the party against whom they are to give evidence may have an opportunity of cross-examining them. To this however there are some exceptions : in an action against a sheriff for an escape, an admission of the debt by the person who escaped, is evidence against the sheriff ; for any matter which might have been given in evidence against the defendant in the original action, is evidence against the sheriff in an action for an escape. 2 Stark. 42. So, in an action against the sheriff for a false return to a *fiery facias*, the admission of the debt by the defendant in the original action was holden good evidence for the plaintiff. *Peake R.* 95. So, in an action against the marshal of the King's Bench prison for an escape, it was holden that an admission of the debt by the party who escaped, made at any time before the escape, was good evidence

for the plaintiff. 7 B. & C. 86. So, entries by a deceased collector of taxes, in the books of his office, as to the sums received by him, will holden good evidence in an action against his surety. 3 Brod. & 132. So, in all cases where an entry in a book has the effect of charging the person making it, after his death the entry may be given in evidence to prove the facts stated in it, whether there were any connection or privity between him and the party to be affected by the evidence or not. See post. *And therefore in ejectment, where it became necessary to prove that one Young was in the occupation in 1770, an entry in the land tax collector's book for that year, made by a collector since dead, showing that Young was rated for and paid the land tax of the premises in that year, was holden by Abbott, C. J., to be admissible evidence of the fact. Ry. & M. 62. So where the goods of B., taken in execution at the suit of A., were sold to A. by the sheriff under a bill of sale, but A. allowed B. to remain in possession; the goods being again taken under an execution against B. at the suit of C., it was holden by Vaughan, B., in an action by A. against the sheriff for taking them, that as B. was at the time in possession of the goods, his admissions that the first execution was merely colourable, and adopted for the purpose of protecting the goods from C's execution, was admissible in evidence for the defendant, although B. was then alive and might have been called as a witness. 3 Car. & P. 395. So, where a declaration is made by a person at the time he does an act, such declaration, being part of the *res gestæ*, may be proved by others. See 1 Holt. 399. So the confession of a person on his death bed, that he forged the instrument upon which the action was founded, has been holden to be admissible evidence. 3 Bur. 1244. and see 1 Camp. 210. The general rule however is as above stated: and therefore in an action on an award, where the submission was to A. and B., and to such third person as they should appoint; it was holden that a recital in the award itself that A. and B. had appointed C., was not evidence of that fact. 4 Camp. 17.

In the cases we have been considering, the admissions and declarations have been received in evidence against the party by whom, or by whose agent &c. they were made. The only instances in which a party's declarations are received in evidence for him, or those claiming under him, are, first, where they accompany an act done; in which case, being part of the *res gestæ*, they may be received in evidence for the purpose of explaining the act. 6 East, 193, and see 1 Camp. 177; 1 Ad. & E. 162; Moody & M. 306. And secondly, in questions of pedigree, the declarations of persons under whom the party claims, if made *ante litem motam*, are receivable in evidence, even although the

them thereby showed a title in himself. Ry. & M. 141 in trespass *quare clausum fregit*, where the defence was, that the defendant entered by declaration of A. that he had authorized the defendant subsequently to the act complained of, was holden not for the defendant. 2 Stark. 71, and see 1 Camp. 290; in an action for penalties for usury, where the defendant denied an account in the handwriting of the borrower, insisted that part of the sum alleged to be for interest was inance of an old account: Lord Kenyon, C. J. refused to give evidence, as being *res inter alios acta*. Peake R. 220.

ns.] A presumption is, where some facts being proved, as a natural or very probable conclusion *from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to, is said to be presumed; that is, taken for granted, until the contrary be proved by the opposite party: *stabitur presumptioni, donec probetur in contrarium*. Co. Lit. 373. And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it, or of proving facts inconsistent with it, if it really never occurred.

These presumptions are of three kinds: *violent* presumptions, where the facts and circumstances proved, necessarily attend the fact presumed; Gilb. Ev. 157; *Probable* presumptions, where the facts and circumstances proved, usually attend the fact presumed; 3 Bl. Com. 372; and *light or rash* presumptions, which however have no weight or validity at all. Id. Gilb. Ev. 157. Co. Lit. 6 b. If a landlord give a receipt for the rent last due, it is fair to presume from this fact that all former rent due by the tenant has been paid. Gilb. Ev. 157. This is a probable presumption; for a man is supposed to receive first, for debts of the longest standing. But if the receipt be in full of all demands, this fact induces a violent presumption that there are no other debts outstanding; and if the acquittance be under seal, the presumption cannot even be rebutted by evidence on the other side, because the deed is an estoppel. Id. 158. If bills of exchange, (which have been negotiated after acceptance, 2 Campb. 439.) be in the hands of the acceptor after they are due, the presumption is that the acceptor has paid them. 1 Stark. 225, and see Id. 374. If it be proved that the plaintiff wrote a letter to the defendant, purporting to contain a bill of exchange, with directions how it should be applied; and that the defendant soon afterwards had a bill in his possession which answered the description contained in the letter the presumption is that both the letter and the bill reached the defend-

ant. 1 Stark. 109. See 4 Camp. 193. So where letters were sent directed to the defendant at Plymouth, and answers were returned in his name, and it was proved by a witness, who knew most of the inhabitants, that no other persons of the same name resided there to his knowledge; Best, C. J. held this to be good presumptive evidence that the answers came from the defendant, without proof of his handwriting. 1 Car. & P. 289. If a married woman be delivered of a child, the presumption is that it is legitimate, unless non access of the husband be proved. See 8 East, 198.

If an old feoffment, or other original conveyance at common law of a freehold, be produced, and it appear that possession has always accompanied the deed, livery of seisin shall be presumed; Gilb. Ev. 158. 1 Ro. Rep. 192. 227. Cro. Jac. 463; but if not accompanied by possession, the presumption is the other way. Plowd. 6, 7. And where a feoffment made in 1812, was produced at a trial in 1825, the court held that the time elapsed was not sufficient to warrant the jury in presuming that livery of seisin had been given; 9 B. & C. 864; nothing short of a twenty years' possession will raise the presumption. Plr Littledale J. Id. In this last case, a memorandum was indorsed on the feoffment, stating *that livery of seisin was given to the plaintiff by R. G., who it appeared was since dead, but the memorandum purported to be attested by a person who was not called as a witness, nor was his absence accounted for: the court held that livery could not be presumed from such an indorsement, it being nothing more than the assertion of some person not upon oath. Id. In the case of an ancient recovery, also if accompanied by possession, it shall be presumed that the tenant to the *præcipe* was seized of the freehold, and it is not necessary to prove it; Gilb. Ev. 27. Mod. 117; or if it were suffered by a remainderman with single voucher only, a surrender by the tenant of the particular estate shall be presumed; Gilb. Ev. 27. 1 Vent. 257. 2 Str. 1120. 1165. 1267. 2 Bur. 1065. and see stat. 14 Geo. 2. c. 20. s. 4; but it is otherwise as to modern recoveries. So, in the case of an old satisfied term, it shall be presumed to have been surrendered. 7 T. R. 2. 3 T. R. 684. 1 Car. & P. 522. So, in the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining the age of 21, it was holden that a conveyance should be presumed. 4 T. R. 682. So, where J. H., a tenant in tail, made a feoffment of the entailed lands to his brother R. H. in 1779, but R. H. never in fact took possession, and J. H. and his issue afterwards remained in possession of the lands until 1826, when the tenant in tail then in possession (having suffered a recovery) devised the lands to others and died: the heirs of the feoffees having then taken possession of the lands, in an ejectment

brought against them by the devisees, the court held that the jury were well warranted in presuming from these facts, and also from the feoffment being found among the papers of the family of the feoffor, that after the feoffment R. H. had made a re-conveyance of the premises to J. H. 10 Bing. 75. So, in the case of ancient deeds, 30 years old or upwards, the execution of them shall be presumed, if they have been accompanied by possession, or be otherwise satisfactorily accounted for, and do not import fraud. Bul. N. P. 255. Gilb. Ev. 100, 101. and see 1 Arch. Pr. C. P. 138, 139. And even an ancient copy of a deed, under such circumstances, the original being proved to have been lost, has been holden to be sufficient to raise the presumption that the original deed was regularly executed. Gilb. Ev. 97. So, where a deed of mortgage which was at first delivered as an escrow to become the mortgagee's deed upon the performance of a certain agreement, was afterwards found in the possession of the mortgagee, and was by him produced at the trial of an action brought by him against the mortgagor, the court held that the deed being in his possession, was presumptive evidence that the condition on which it had been delivered had been complied with. 5 B. & Ad. 715.

If no interest have been paid on a bond, or any other payment made on account of it for 20 years, the presumption is that it has been paid; 6 Mod. 22, and see 1 Bur. 434. 2 Str. 827. 826. 2 L. Raym. 1370. 1 Camp. 27. 2 Id. 321; and indeed, by a recent statute, (3 & 4 W. 4, c. 42, s. 3.) this is the time now limited, within which any action on the bond must be commenced. See ante, p. 30. But even a shorter period coupled with other circumstances, such as a subsequent settlement of accounts between the parties in which no mention of the bond was made, or the like, will be sufficient to raise the presumption of payment. 1 T. R. 270. 1 Camp. 27. This presumption, however, may be rebutted, by shewing that the obligor has been abroad, so that no proceedings could be had in order to compel payment, 1 Stark. 101, or by any evidence of a payment, or of an acknowledgment of the debt, within the time above mentioned. See 2 Camp. 321. So, that a judgment has been satisfied, may it seem be presumed in like manner, from lapse of time. 1 Camp. 217. And in one case, this rule was extended to the case of a promissory note; 5 Esp. 52; but in a subsequent case, Abbott, C. J., held that, as bills of exchange and promissory notes, being simple contract debts, were the subject of a particular statute of limitations, this rule of presumption of payment from lapse of time did not apply. 1 D. & R. 16. In an action by a workman for wages, witnesses for the defendant proved that his workmen (including the plaintiff) came regularly every Saturday night for their wages, and he

presumed they were paid, as he never heard any of them complain: Lord Kenyon, C. J., held this evidence to be admissible, as grounding a presumption of payment. 1 Esp. 296, and see 1 Car. & P. 81, *in notis*. So, where a servant, who was in the habit of selling goods for her master, also, according to the established course of dealing, was in the habit of accounting with him every evening and paying over to him such sums of money as she received in the course of the day, without any written vouchers passing between them: in an action by the master against her for the money so received by her, Lord Ellenborough, C. J., held that it must be presumed that these sums were accounted for and paid over to the plaintiff, in the regular course of the business, unless he proved to the contrary. 3 Camp. 10. Where two cheques of the defendant upon his banker, payable to the defendant by name, and paid, one of which was indorsed by the plaintiff, and the other by a person authorized by him to collect debts, Lord Kenyon, C. J., ruled that these were presumptive evidence of payment; 3 Esp. 196; but they would not have been so, if not so indorsed; *Id.*; and this was ruled by Dallas C. J., in a case where part of the produce of the cheque was actually placed to the credit of the plaintiff with the same banker, with whom he kept an account. Gow, 16. In all other cases, if a debt be proved to have existed, the presumption is that it still continues unliquidated, unless the contrary be proved. 2 Camp. 50.

So an adverse enjoyment of lights, or of a right of way or other easement, or of a pew in a church, or of a market or the like, for 20 years, uninterrupted and unexplained, raises a presumption of a right by grant or prescription, and no other title than the 20 years' enjoyment need be proved. 2 Saund. 175. (n. 2.) 3 East. 294. and see 5 T. R. 296. 1 Camp. 463. 1 Taunt. 279. 2 Barn. & Ald. 662. 11 East, 488. And this is now in fact the time limited by law, within which such a right must (if at all) be contested. See Stat. 2 & 3 W. 4, c. 71, s. 2, 3. *ante*, p. 25, 26. But this must be understood of an enjoyment or possession with the acquiescence *of the person seised of the inheritance: for if a tenant for years or for life permit another to enjoy an easement on his estate for 20 years or upwards without interruption, and then the particular estate determine, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession, he may dispute the right to the easement, and the length of possession will be no answer to his claim. 11 East, 372. 4 B. & Ald. 579. 2 Saund. 175. d. How far this is altered by the stat. 2 & 3 W. 4, c. 71, above alluded to, has not yet been decided. See *ante*, p. 25, 26. So in other cases, a right shall be presumed from length of possession: thus, where an enjoyment of a right of common for a length of time was proved, a right of common was thereupon pre-

sumed; and it was holden that acts of ownership by the lord, such as making leases of the common, and the like, did not rebut the presumption; 1 Stark. 102. and see *Id.* 349; and 30 years is now the time limited by law, within which such a right can (if at all) be contested. See 3 & 4 W. 4, c. 71, s. 1, ante, p. 25. So a right may be presumed from continued acts of ownership. See 2 Barn. & Ald. 554. 1 Camp. 309. 2 Brod. & B. 403. So an immemorial custom may be fairly presumed from a regular usage for 20 years, uncontradicted and unexplained; it is deemed even cogent evidence of it, and such as will warrant the judge in recommending the jury to find the custom. 2 B. & C. 54. So where the plaintiffs, who were owners of a fishery in the river Derwent, claimed a right to draw their nets at certain landing places, on the bank of the river, and in a close of the defendant, proof that they, and those possessed of the fishery before them, used to do so without interruption for upwards of 20 years, and had occasionally repaired the landing places, was holden to be sufficient to raise a presumption of a grant of the right to the owners of the fishery, by some former owner of the close. 2 Brod. & B. 667. So, on a question whether a creek was a navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure without the consent of the person claiming exclusive property in the creek, was holden to be evidence from which the jury might presume it to be a public river. 1 Marsh. 313. So, where toll has been taken immemorially for passing upon a certain highway, a grant of the soil originally to the public may be presumed, as a consideration for the toll proof being given that the soil through which the highway passed, and the tolls, were before the time of legal memory in the same hands, though severed since. 1 T. R. 660. So, where a man has received rent for premises during 20 years or upwards, it shall be presumed (in the absence of other evidence) that he is seised of the fee. Cowp. 595. 3 Woodeson, 333. See Gow. R. 173. So, where a man is seised of land, the presumption is that he is also entitled to the minerals under it; but in mining countries the presumption is not a strong one, for there it is usual for one person to be entitled to the surface of the land, and another to the minerals under it; and where it appeared that when a plaintiff came into possession of certain land in Cornwall, another person (not the owner) was working mines under it, and that although the plaintiff sunk a shaft and raised ore, the ore was constantly taken away by persons claiming a right to it, and who actually afterwards took possession of the mine: Abbott, C. J., left it to the jury to say whether these facts did not rebut the presumption of the plaintiff's being entitled to the minerals under.

the land, arising from his being the owner of the surface. *Ry. & M.* 396. So, although an uninterrupted possession of land for 20 years, raises a presumption of a seisin in fee, as above mentioned, yet this presumption like others may be rebutted by shewing how or on what terms the party became possessed of it: and therefore where it appeared that the defendant and his ancestors were in possession of certain land for 50 years, but it also appeared that possession of it had originally been given to the defendant's ancestor by an ancestor of the plaintiff as security for a debt, which had long since been liquidated by the rents and profits: the court held that, as it appeared that the original enjoyment was consistent with the fact of there not having been any conveyance of the property, a conveyance was not to be presumed; and that the judge at the trial was right in putting it to the jury, as a question of fact, whether an actual conveyance of the property had ever been executed by the plaintiff to the defendant, or the persons respectively under whom they claimed. *5 B. & Ald.* 232. So, an inclosure from the waste, made 12 or 13 years before, and seen from time to time by the steward of the lord of the manor, without objection being made to it, may be presumed to have been made by licence of the lord. *11 East*, 56, and see *Id.* 488. So, where a declaration stated that the plaintiffs were the proprietors of a licenced theatre, but the licence itself was not given in evidence, Abbot, C. J. said that he should presume a licence, from the fact of the performances at the theatre having gone on without interruption. *1 Car. & P.* 220. Proof of the right of a lay impropriator to the tithe of corn, raises a presumption that he is entitled to the tithe of hay and other great tithes; *1 Ad. & E.* 449, 455; but mere non-payment to him of the tithe of hay, for any time however long, will not raise a presumption of a grant or discharge of the tithe to the occupier of the land. *Id.* 449. Receipt of the tithe of corn by a vicar, for any one farm in the parish, raises a presumption of his right by endowment to the tithe of corn generally throughout the parish. *1 Car. & P.* 316. So where two manors have been formed out of one, proof of the customs of one is presumptive evidence of the customs of the other. And for a similar reason, the customs of one manor, relative to tenure, have been holden admissible evidence of the customs of another, in any of the three northern counties, because anciently they made one earldom. *Fortesc.* 41. 44. It is a presumption that waste lands on the sides of a highway, and the soil of the way itself to the middle, belong to the adjoining land, whether that land be freehold or copyhold. *7 B. & C.* 304. Where the lands of two persons are divided by a hedge and ditch, the presumption is that both ditch and hedge belong to the land on that side of the hedge on which

the ditch is not; for it is fair to presume that the person who made the ditch, made it in his own land, and threw the earth dug from it (and which formed the ground on which the hedge *grew) upon his own land and not on that of his neighbour; 2 Selw. N. P. 1218; but where there is a ditch on both sides, the property in the hedge must be determined by proof of acts of ownership. *Id.* and see 3 Taunt. 138, per Lawrence, J. So, if the lands of two persons be divided by a wall, the ownership of the wall may be presumed from the exercise of acts of ownership; and if an user be proved by both parties, the presumption is that they are tenants in common of the wall, and of the land on which it stands: 8 B. & C. 257.

In an ejectment upon the assignment of a term to secure an annuity, Lord Ellenborough held that it was not necessary for the lessor of the plaintiff to prove the enrolment of the annuity, but that a proper memorial of the annuity deeds should be presumed, till the contrary was shewn upon the part of the defendant. 3 Camp. 7. A licence to import certain articles, being regularly lodged at the custom-house, and there accidentally destroyed, it was holden that it should be presumed that the time of clearance, as required by the order in council, was indorsed on it, it being shewn that without such indorsement the custom-house would not have permitted the entry to have been made. 1 Stark. 222. So, if it be proved that goods were entered at the custom-house, which could not have been so entered without a licence, the presumption is that there was a regular licence. 2 Camp. 44. So, if it be proved that indentures of apprenticeship, under which the party had served 7 years, were then delivered up to him and were afterwards lost, it shall be presumed that they were duly stamped. 7 East, 45. See 2 B. & Ald. 478. Banker's notes, payable to J. S., and dated on a particular day, shall be presumed to have come into J. S.'s possession on the day they bear date. 6 T. R. 57. Where a statute requires a certain document to be delivered by the captain of every coal ship to the clerk of the market, and such document is delivered as from a certain ship, in which H. is described as captain; upon proving that H. is captain of that ship, the presumption is that the document was sent by him. 1 Stark. 117. If after the expiration of a written lease containing a covenant on the part of the tenant to keep the premises in repair, the tenant verbally agree to hold over, paying an additional rent, but nothing more being expressed between the parties respecting the terms of the new tenancy; the presumption is that he holds under the covenants of the former lease, as far as they are applicable to his new situation, and he is consequently liable for not keeping the premises in repair. 4 Camp. 275. Where it is proved that a ship left her port of loading,

with a licence to carry her cargo to a certain place, the presumption is that she sailed for that place. 2 Camp. 69. If a ship have been missing, and no intelligence had of her within a reasonable time after she sailed, the presumption is that she is lost. 2 Str. 1191. 1 Stark. 121, and see 2 Camp. 85. 1 Holt, 242. If tenant for life be beyond seas, or elsewhere absent himself in this realm, by the space of 7 years together, and in an action by the lessor or reversioner for the recovery of the tenements, no sufficient and evident proof be made of such tenant being alive, he shall be accounted as naturally dead, and the jury shall be directed to *give their verdict accordingly. 19 Car. 2 c. 6. A man having a lease in reversion after the determination of a lease for life, has been holden to be a reversioner within the meaning of this statute. Carth. 246. So, in other cases, if a man be abroad for 7 years or upwards without being heard of, the presumption is that he is dead. See 15 East, 293. 6 East, 80. Dy. 185. a. 2 Camp. 113. 273. So, where a party claimed land through J. S. his grandfather, who had been dead more than 100 years, and it appeared in the course of the trial that J. S. had several brothers elder than himself, but no evidence was given to shew what had become of them: the judge told the jury that after such a lapse of time they might presume them to be dead without issue, and the court held the direction to be right. 8 B. & C. 22. 3 Car. & P. 402. Where it was proved that a tenant for life had been absent for 14 years, but it was objected that this was not proved by any of his family, but by a stranger merely residing in his neighbourhood: the court held it to be *prima facie* evidence of his death; if any of his family had heard of him since, they might have been called to rebut the presumption. 4 B. & Ald. 433. This absence for 7 years must however be understood as raising the presumption merely that the party was dead at that time, and not that he was alive up to that time; and therefore where it was necessary to prove that a man was alive in 1812, and had died since, it was holden that proof that he went to America in 1807, and had not since been heard of, although evidence that he was dead in 1814, was no evidence that he was alive in 1812. 5 B. & Ad. 86. But if it be necessary to prove that a party is alive, if it appear that he was alive within 7 years, the presumption is that he is still alive. See 2 Camp. 113. 2 Ro. Rep. 461.

In an action upon a bill of exchange against the drawer or indorser, or on a promissory note against the indorser, proof that the defendant promised to pay it, is presumptive evidence of presentment, dishonour, protest and notice, 2 Camp. 105. 188. 4 Camp. 52, and is a sufficient admission of the handwriting of the defendant, and of the other parties.

2 Camp. 474. 7 East, 281. In assumpsit for not delivering a quantity of oil, where it was averred that the plaintiff was always ready and willing to accept it and to pay for the same; and it was proved at the trial that the plaintiff made a demand of the oil, but it did not appear that he was ready to pay for it; the court held it to be sufficient; for it should be presumed that he was ready to pay for the oil, from his having demanded it. 1 Marsh. 412.

In an action against any person exercising an office, profession or employment, such as an attorney, officer of the customs or excise, justice of peace, parson, physician, executor, &c., if it be proved on the part of the plaintiff that the defendant acted as such, the presumption is that he has been duly appointed, and his appointment therefore need not be proved. See 6 T. R. 535. n. 4 T. R. 366, per Buller. 1 Stark. 405. Peake, 236. But where an action is brought by such a person, no such presumption exists; but he must prove his appointment &c., unless it appear to be admitted by the defendant expressly or impliedly, on the face of the record or otherwise, in that or in former transactions. See 1 New Rep. 196. 8 T. R. 303. 4 T. R. 366. 3 T. R. 632. 10 East, 104. 2 M. & S. 553. So, to support a plea in abatement that A. and B., assignees of C. a bankrupt, ought to have been joined as co-defendants in the action, it is not sufficient to prove that they acted as assignees, but they must be proved to be such by the production of the assignment or the admission of the plaintiff. 1 Stark. 296. But if it were incumbent on the defendant to prove that the plaintiffs were assignees of a bankrupt, proof that they acted as such would be sufficient. As to officers of excise and customs, however, it is sufficient in all cases to prove that they acted as such, by the express provisions of a statute. And in the case of a clergyman, although he is obliged to prove admission, institution and induction, yet after 10 or 20 years' possession it shall be presumed that he subscribed the articles, and such subscription need not be proved. Gilb. Ev. 220.

In an indictment against an officer under government for malversation in his office, a letter of instructions signed by three of the lords of the treasury was allowed to be read in evidence, without producing the commission by which they were appointed; 2 Camp. 131; for it is a general presumption of law that a person acting in a public capacity, is duly authorized so to do. For the same reason, upon an indictment for perjury in an oath taken before a surrogate in the Ecclesiastical Court, the fact of the person who administered the oath having acted as a surrogate, is sufficient evidence of his being so, without producing his appointment. 3 Camp. 432.

The intention with which an act is done, must also necessarily be the subject of presumption. It can never be the subject of direct and posi-

tive proof; and therefore if not admitted, it must be presumed either from the nature of the act itself, or from other facts and circumstances connected with it. Thus in an action for a libel, the malice may be presumed from the libel itself, or from other acts having immediate relation to it, or even from other libels which directly refer to it; 2 Camp. 72, 73. n. 1 Camp. 49. Peake, 22. 160. See 2 Stark. 93: and on the other hand the defendant may be allowed to rebut the presumption, by giving in evidence other passages in the paper &c. connected with, and indicating the intention and mind of the defendant with respect to, the specific paragraph charged in the declaration as libellous. 2 Camp. 396, 400. So, a man's knowledge of a fact, may be presumed from his acts which have relation to it; thus, where the question was whether the acceptor of a bill of exchange knew that the payee was a fictitious person, evidence was admitted of irregular and suspicious transactions relative to other bills drawn by and upon the same persons as the present bill, and payable to fictitious payees. 2 H. Bl. 268. Where an action was brought against a member of a club for the amount of his annual subscription, the rules of the club being given in evidence, it was objected that there was no proof that the defendant knew of them; but Abbott C. J., held that every member of a club must be presumed to be acquainted with its rules. 2 Car. & P. 556.

But it shall not be presumed that a man has any notice or knowledge of the contents of a deed, merely from the fact of his having *attested the execution of it by another person; for it is not probable that he read it or heard it read. 5 Taunt. 257. So, a loan for money from A. to B., cannot be presumed from the bare fact that A. delivered a sum of money to B. which he had borrowed of another; for where money is paid, the presumption is that it is paid in liquidation of an antecedent debt, and not by way of loan. 1 Stark. 474. So, it shall not be presumed that a letter was sent by the post, merely from evidence that it was written by a merchant in his counting-house, and put on a table for the purpose of being carried to the post-office, and that by the course of business in the counting house all letters deposited on that table used to be carried to the post-office by a porter. 4 Camp. 193. So, it shall not be presumed that a man has employed another in a particular character, merely from his having addressed a letter to him in that character, and having afterwards employed him. 1 Stark. 335. So it shall not be inferred that rent was payable quarterly by a particular tenant, merely from evidence that the landlord's other tenants, under similar circumstances, paid their rent quarterly. Peake, 95. So, where the issue was, whether the holding of a plaintiff was for a year from the 3d April, 1621, and thenceforth from year to year: evidence of his having paid rent was

holden not to support the issue, for that would equally be proof of a demise for 21 years. 1 Car. & P. 262. In trover for bricks against a person named Wood, it was proved that some men took them away in a cart on which was the name "Wood" and on being asked why they did so, they said they were ordered by their master, Mr. Wood: Lord Gifford, C. J. held that this was no evidence against the defendant. 1 Car. & P. 75. Where the plaintiff sent goods to the defendant to sell on commission, and at the end of a year brought an action to recover the amount, stating in his declaration that the defendant had sold the goods, but had not accounted: it was holden that a sale of the goods could not be presumed from the time elapsed, but that it must be actually proved. 1 Car. & P. 572. In another case, where 14 years had elapsed after the sending of the goods for sale upon commission, before action brought, and where the declaration stated a promise to account &c. upon demand, to which the statute of limitations was pleaded; and the plaintiff proved a demand to have been made shortly before action brought: it was contended that a previous demand might be presumed from the lapse of time, and that the defendant accounted &c.; but the court held, that although it might be presumed from the lapse of time that the defendant had accounted &c., if the circumstances of the case warranted such a presumption, yet that a demand could not be presumed; and that as the only demand actually proved was within 6 years, the plaintiff was entitled to a verdict. 1 Taunt. 572. So nothing shall be inferred from the non-production of books, papers &c. upon notice; it merely entitles the other party to give secondary evidence of their contents. 3 Camp. 363. And lastly, nothing shall be presumed which is contrary to a record. Gilb. Ev. 122.

Proofs.] Whatever is not admitted or presumed, must be proved. *Proofs are of two kinds: written evidence, and parol evidence. Written evidence includes all matters of record, such as the statutes, such also as the records of the courts of Westminster, and of every other court of record in the kingdom; matters *quasi* of record, such as the judgments and other proceedings of courts not of record, and of foreign courts; matters of state, such as the king's proclamations, &c.; public books and papers, such as the books of corporations and Public companies; and private writings, such as deeds, agreements, bills of exchange and promissory notes, private books of account &c. parol evidence, is that evidence which is given by witnesses, *viva voce*, in a court of justice, upon a public examination by counsel, at the trial. As these different kinds of evidence are intended to form the subject of the two next chapters, we shall confine ourselves in this place to the

consideration of a very important principal relating to them generally.

It is a general rule that the best evidence the nature of the case will admit of must be produced, if it be possible to be had ; but if not possible, then the next best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than that which is produced, the very non-production of it creates a presumption that it would have detected some falsehood which at present is concealed. 3 Bl. Com. 368. Gilb. Ev. 16. 1 Show. 397. Carth. 220. Holt. 284. 1 Salk. 281. 3 East, 192. Therefore before secondary evidence is offered, a foundation for it must be first laid, by proving that better evidence cannot be obtained.

Thus, in order to prove a written lease for years or other deed, nothing else shall be admitted but the very deed itself, if in being and within the control of the party who has to prove it ; Gilb. Ev. 93. 10 Co. 92. b. 93 ; even the declarations of the opposite party, as to the contents of it, will not dispense with its production. Ry. & M. 187. 1 Esp. 89. 4 M. & S. 350. 1 Car. & P. 558. see id. 73, semh. cont. Nor can parol evidence be given of any part of the contents of a lease or other deed ; and therefore, in a sessions case where it became necessary to prove so much of the terms of a tenancy, as to shew that the premises were hired for a year at a rent of 10*l.*, and it appeared that the party held under a written agreement, the absence of which was not accounted for, the court held that it could be proved by the written agreement only. 1 B. & Ad. 29. So, in trespass for *mesne* profits against A., the plaintiff, in order to render a judgment in ejectment against B. evidence, proved by parol that B. put A. into possession of the premises ; but it appearing, upon cross examination of the witness, that B. was let into possession under a written agreement, and that agreement not being produced, or its absence accounted for, the plaintiff was nonsuit, and the court held the nonsuit to be correct. 8 Bing. 239. see 5 id. 136. But where the questions were merely, whether a person occupied certain premises for a certain time, and what was the annual value of them : the court held that these might be proved by parol evidence, although the party held under a written agreement ; and that parol evidence of the fact that certain rent was paid, was receivable as proof of the *annual value. 7 B. & C. 611. So, where lands were let under a verbal agreement, that the party should hold them on the same terms as a former tenant, and the former tenant held under a written agreement : in an action for rent, it was holden that the written agreement should be produced and proved : and upon its being produced, it appeared not to be properly stamped, and the plaintiff was

therefore nonsuit. *Moody & M.* 131. So, a transfer of stock cannot be proved by parol, because it is in writing; it can be proved by a copy of the entry in the bank books only. *Peake R.* 43. So, a sale and purchase of goods, if under a written contract, cannot be proved by parol, even although a bill of exchange have been given for them; *2 Car. & P.* 52; and where a broker effects a sale between two parties the bought and sold notes delivered by him to them, and not the entry in his books, form the contract, and, if in existence, are the only evidence of it. *Moody & M.* 43. And even where a house was built under a written contract, and an action was brought for extra work only, it was holden that the written contract should be given in evidence, in order to shew that the work, which was the subject of the action, was not included in it; and the contract being in court, but unstamped, it was holden that the judge could not inspect it, for the purpose of ascertaining that fact. *Moody & M.* 257. But this was rather an extreme case; and where a plaintiff who had engaged by a written contract to do the plastering work in the interior of some houses, was, during the progress of the work, employed verbally to execute an ornamental entablature in front of them; in an action for the amount of this latter work, although he gave in evidence the written contract, upon being pressed by the defendant's counsel to do so, yet Lord Tenterden, C. J. intimated that there was no necessity for his having done so. *Moody & M.* 413. So, where a memorandum of an agreement had been drawn up between the parties, but was in fact never signed by them, the court held that it was not necessary to produce it, as it was a proposal only, and not an agreement. *3 B. & Ald.* 326. See *2 Brod. & Bing.* 99. *1 Car. & P.* 582. Where a witness, who had inspected the accounts of a trader before he became bankrupt, was called to prove that the trader's debts then amounted to much more than his credits, and admitted that his information arose from his inspection of the accounts; it being objected that he could not be asked the question, but that the accounts themselves ought to be produced, Lord Kenyon, C. J. held, that although he could not give evidence of the particular contents of the accounts, he might state what, according to his observations, was the general result of them. *Peake R.* 116.

So, as to the execution of a deed or other written instrument, if not attested, it may be proved by proving the handwriting of the parties. See *1 Arch. Pr. C. P.* 138, and post. But if it be attested, its execution must be proved by one of the subscribing witnesses, that being deemed the best evidence of the fact. *7 T. R.* 266, *Peake*, 31. *4 Esp.* 240. *Gilb. Ev.* 90. If however that evidence cannot be had: as if the subscribing witness be since dead; *1 Barn. & Ald.* 12. *Gilb. Ev.*

101, and see 6 East, 85; or have become *insane; 12 Vin. Abr. 224. 3 Camp. 283, and see Id. 457; or blind; see 1 L. Raym. 734; or be abroad, out of the reach of the process of the court, Peak, 99. 1 Esp. 2. 7 T. R. 265. 12 Vin. Abr. 224, and see 1 Stark. 90, whether domiciled there or not; 2 East, 250; or if he have set out for the purpose of leaving the kingdom; 1 Taunt. 461, see 3 Car. & P. 355. 9 Bing. 359; or if from circumstances it may fairly be presumed that he has left the kingdom; 2 Camp. 282; or if it appear that he is serving in the navy, 2 Taunt. 223, or the like; or if after a *bona fide* serious and diligent inquiry he cannot be found; 1 Dong. 93. 2 East, 183. 7 T. R. 266. 1 Camp. 303. 1 Taunt. 364. 2 Camp. 282, and see 4 B. & Ald. 697; or if he be interested in the event of the suit, 2 Esp. 297. 5 T. R. 371, or become subsequently incompetent as a witness: 2 Str. 533, see 5 Bing. 496: then upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed, that is, you may prove the deed, by proving the handwriting of the witness. See 1 Barn. & Ald. 19.

A will of lands must be produced and proved, in the same manner as a deed; and the witness called to prove it, should be prepared to give parol evidence of every circumstance attending the attestation, necessary to shew that the will was duly executed and attested according to the directions of the statute of frauds. 1 Arch. Pr. C. P. 140, and see post. If the original will be lost or destroyed, the contents of it may be proved by a copy, 2 Camp. 389, or by parol evidence; Id. 390. n; but the probate is no evidence whatever of a will of lands. Id. 390. Gilb. Ev. 71. The probate of a will, under the seal of the ecclesiastical court, is however sufficient evidence to prove a will of personal property, or that J. S. is executor, or the like. Gilb. Ev. 71. 73. 4 T. R. 258. 3 Salk. 154. Bul N. P. 246. See 1 Arch. Pr. C. P. 124.

A bill of exchange or promissory note must be produced, and proved in the same manner as the execution of deeds or other written instruments is proved. If it have been lost or destroyed, in some cases it may be proved by secondary evidence. If it have been destroyed, it may in all cases be proved by secondary evidence, as in the case of a deed. See 2 Camp. 211, 212. If it be lost, at a time when it is not in a negotiable state, as when not indorsed by the payee, or when specially indorsed and not indorsed over by the special indorsee, 2 Camp. 214. n, or perhaps after being protested for non-payment: 12 Mod. 301. *sed qu.*: in such a case, in an action against the acceptor of the bill, or the drawer of the promissory note, the plaintiff may give secondary evidence of its contents. But if it were in a negotiable state, at the time it was lost, as if it were indorsed in blank, no action can be maintained

on it, unless actually produced at the trial, and proved as in ordinary cases; 3 Camp. 211. 1 Holt, 144; even although it was over-due at the time it was lost. 7 B. & C. 90.

Secondary evidence cannot be given of an instrument which was in the hands of the opposite party, although it is proved to have been destroyed or lost, unless notice have been given to produce it. *Doe v. Morris*, 3 Ad. & E. 46.

Where the matter to be proved, however, was whether J. S. was in the habit of accepting bills drawn in a particular manner, it was holden that this might be done by parol evidence, without producing any of the bills. 3 Camp. 310. So, in an assumpsit against a *carrier for the non-delivery of written instruments, it was not necessary to prove a notice to the defendant to produce them, before giving parol evidence of their contents. 1 Camp. 143. So, in an action against a person, to whom a foreign bill had been delivered for the purpose of negotiating it, for not paying over the produce of it, Gaselee, J. held that parol evidence of the bill might be given. 3 Car. & P. 284. Where, after a witness had been examined in chief, he was asked in cross-examination what interest he took under a certain will, in order to shew that he was interested; Lord Ellenborough said that although the contents of a written instrument may be inquired into in an examination on the *voire dire*, without producing the instrument, yet he could not allow of it in an examination in chief. 2 Camp. 14. If a verbal demand and a demand in writing be made at the same time, for the purpose of bringing an action of trover, and the one has no reference to the other, evidence of the verbal demand is sufficient, without producing that which was in writing. 1 Camp. 439.

The best evidence of a letter, is of course the letter itself, and proof of the hand-writing. But if it be in the possession of the opposite party, then upon proving notice to produce it, and it not being produced, parol evidence may be given of its contents; and this evidence may be given by any person who recollects the contents of the letter, as well as by the person who wrote it. 1 Stark. 167. Where it appeared that the defendants had acknowledged the receipt of a letter of a particular date from the plaintiff, which upon notice they did not produce on the trial; an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was holden to be admissible evidence of the contents of the letter, on proof that according to the plaintiff's course of business the letters which he wrote were copied by this clerk and then sent off by post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found

correct. 3 Camp. 305. and see Id. 379. A copy taken by means of a copying machine, may be received as secondary evidence, after proving notice to produce the original; but it cannot be treated as an original letter. 3 Camp. 228.

Where a British licence to trade has been lost or destroyed, secondary evidence may be given of it, (after first proving that the licence put on board the ship has been lost &c.) by producing examined copies of the order in council for granting the licence, and of the licence preserved in the Secretary of State's office; 2 Camp. 605, see 2 Taunt. 237. 1 Stark. 222; but it cannot be proved by parol evidence.

As secondary evidence of a bankrupt's certificate, it is sufficient if a witness state that he was employed by him to solicit that certificate, and that looking at the entries in his books he has no doubt it was allowed by the Lord Chancellor; but an entry of the allowance of it, in the book kept in the office of the Secretary of Bankrupts, is not sufficient for that purpose. 3 Camp. 499.

The affidavit upon which a certificate of registry is granted at the Custom House, is the best evidence of ownership of a vessel, as *against the owner; and if this affidavit be lost or destroyed, secondary evidence may be given of its contents. But the register book kept at the Custom House, in which entries are made of the certificates of registry granted, and upon whose affidavits, is not admissible evidence for this purpose. 4 Camp. 90. and see 2 Camp. 171. 14 East, 220.

Where the question was whether the abbey *De Stentibus* was an inferior abbey or not, Dugdal's *Monasticon Anglicanum* was refused as evidence, because the original records might be had at the Augmentation Office. 2 Show. 163.

In all cases where it is necessary to prove any part of the pleading in issue, by a record, where *nul tiel record* has not been pleaded, it is sufficient to give an examined copy of the record in evidence. This is undoubtedly an exception to the rule which we have now been illustrating; but it has been adopted, because, if it were necessary to give the record itself in evidence, it might be required in several parts of the kingdom at the same time; and by thus removing it from the place in which it is deposited, there would necessarily be great danger of its being lost. Gilb. Ev. 7, 8. For the same reasons, the journals of the House of Lords and House of Commons,—a bill, answer, depositions and decree in equity,—libel, answer, depositions, &c. in the ecclesiastical and admiralty courts,—the rolls of a court baron and of other inferior courts,—parish registers—entries in corporation books or the books of public companies, relating to things public and general,—may all be proved by examined copies.

And if a record be lost or destroyed, an ancient copy, *vetusta temporis, judiciaria cognitio, roborata* may be received in evidence, without proof of its being examined with the original. Gilb. Ev. 22, 23. Thus, the copy of the decree of thithes in London, has been often given in evidence, without proving it to be a true copy, because the original is lost. 1 Vent. 257. So, a copy of the record of a recovery of lands in ancient demesne has been admitted in evidence, where the original was lost, and possession had for a long time accompanied the recovery. Id. Gilb. Ev. 23. So, in ejectment for a rectory, to which a recusant presented, the record of conviction for recusancy being burnt, was allowed to be proved by the estreats in the Exchequer. R. Hard. 323. 1 Salk. 285. see also 1 Str. 526. Hardw. 304.

Where the solicitor to a commission of bankrupt was called upon the part of a defendant to prove an admission by the plaintiff as to a certain fact in an examination before the commissioners, and upon looking into the examination the admission was not found: Best, C. J., allowed the solicitor to prove, that the admission was actually made, although not set down in the examination. Ry. & M. 231. 1 Car. & P. 649.

As to deeds, however, it is necessary to remark, that if pleaded with profert, nothing but the production of the deed itself will suffice; 4 East. 585; it is only when an excuse for profert has been pleaded, in cases where profert or excuse is necessary, that this secondary evidence of the contents of a deed can be received. See ante, p. 137.

*Where the copy of a document, (the document itself not being evidence at common law,) is made evidence by act of parliament, a copy must be produced; the original is not made admissible evidence by implication. 2 Camp. 121. n.

In all these cases, in order to sustain an objection that the best evidence has not been adduced, it must appear, either from the nature of the case, or from the examination or cross-examination of the parties' own witnesses, that there exists higher evidence of the fact to be proved; the opposite party will not be allowed to shew it, by evidence upon his part. Thus in an ejectment, where it was proved by a witness for the plaintiff, that the defendant held under A., and that A. admitted to him that he held under the lessor of the plaintiff; but the same witness also stated that he had drawn an agreement or lease between the lessor of the plaintiff and A., and this not being produced, the plaintiff was nonsuit: the court held the nonsuit to be right. 6 Bing. 533. So, where a witness proved a sale and delivery of timber, but in his cross-examination stated that the plaintiff had told him that the sale was by

a written contract, which he at the same time shewed him, it was holden that the contract must be produced; it was accordingly produced, was recognized by the witness to be the one shewn to him, and appeared to be a broker's bought and sold note; and it was then objected that this written contract must first be proved by the broker who made it, before it could be read in evidence; but Best, C. J. held, that as the whole of a party's admission must be taken together, as well that part which makes for him, as that which makes against him, not only that part of the plaintiff's statement which shewed that the sale was under a written contract, but his statement that the paper in question was the contract, was receivable as evidence, and sufficient proof of the contract without calling the broker. Ry. & M. 257. But on the other hand, where, in an action for work and labour, after the plaintiff had closed his case, the defendant produced a written agreement, under which it was alleged that the work was done, but not being stamped it could not be read in evidence; he then contended that as the work was done under a written contract, the plaintiff, as he had not produced and proved it, ought to be nonsuit: the court however held, that as it did not appear from examination or cross-examination of the plaintiff's witnesses that there was any written contract, the defendant, if he wished to set up one, ought to have produced it in such a state as to be receivable in evidence, and prove it, as part of his evidence. 6 Bing. 332. S. P. 8 Taunt. 327. So where, upon the trial of an appeal against an order of removal, the respondents proved by parol evidence the taking of a tenement in the year 1828, at a yearly rent exceeding 10*l*. by the husband of the pauper (who had since gone to America,) and the occupying of and payment of rent for the same for two years; the appellants then proved by a witness, that the taking in question was by agreement in writing; and it was contended before the Court of King's Bench for the appellants, that as the respondents had not produced and proved the written agreement, the order of removal ought to be quashed: but the court *held, that as the objection appeared from the appellant's evidence only, and not from that of the respondents, it was for the appellants to produce and prove the agreement, if they intended to found any defence upon it; and the court stated the rule to be, that if after proof by a party of a contract by parol, it appear from that party's witnesses, either upon examination or cross-examination, that the contract was in writing, he must then produce and prove it; but if this appear, not from the evidence of his witnesses, but from witnesses called by the opposite party, then the latter must produce and prove the written agreement, if he would derive any advantage from it. 4 B. & Ad.

208, and see 9 B. & C. 708. And the question put to a witness, in such cases, whether there is not a written agreement upon the subject, is not objectionable on the ground of its eliciting oral evidence of the contents of a written instrument; for there must be some oral evidence, to introduce the fact of there being a written instrument. Per Parke, J. 1 Ad. & E. 170. Even where, in an action against an auctioneer by a vendee, to recover a deposit, (the vendor not being able to make a good title,) it appeared from the plaintiff's witness that there was a written agreement relating to the sale, signed by the vendee: it was holden competent for the defendant's counsel to ask the witness whether that agreement related to the deposit; for if it did, it might be a necessary part of the plaintiff's case, and he should have produced and proved it: 1 Ad. & E. 167. Where, in an action to recover the value of certain East India indigo warrants, which the plaintiff had entrusted to his broker, but without any authority to him to sell or pledge them; the broker being called as a witness for the plaintiff, stated that he sold the warrants to the defendants, and also stated that it was by a contract in writing; and for the defendants it was then objected that the plaintiff should produce and prove the written contract as part of his case: but the court held that it was for the defendants to produce and prove the contract, in order to shew that it was a valid one within stat. 6 Geo. 4, c. 94, s. 2, by which alone the sale in this case could be legalized. 2 B. & Ad. 686.

Upon an affidavit by the lessor of plaintiff in ejectment, that his servant, at the instigation of the defendant, had stolen from him a lease, which was material evidence in the cause, and this not being denied by any affidavit of the defendant, the Court of Common Pleas, by rule, ordered that an examined copy of the enrolment of the lease might be received at the trial as secondary evidence of it. *Doe v. Ries*, 7 Bing. 724.

Secondary Evidence.] It has already been observed (ante, p. 372,) that to prove a deed or other written instrument, nothing else shall be admitted but the very deed itself, if in existence and within the control of the party who has to prove it; and it may be said to be within the party's control, not only when he has it in his possession, but when it is in the possession of any third person whom he may compel by *subpœna duces tecum* to produce it. In order therefore to lay a foundation for secondary evidence of such a deed or writing, in all cases where the opposite party has it not, and ought not legally to have the custody of it, the party desiring to give such secondary evidence must prove, either that it has been actually destroyed, or that it is not to be found among the papers of a person who once had it and has lost it, or among the papers

of the person legally entitled to and most likely to have the custody of it; and where it cannot be proved to have been destroyed, such diligent search must be proved to have been made for it, as to satisfy the judge that it would have been found if it were still in existence. Thus where a person subpoenaed to produce some letters, stated that he thought he had put them in a certain box, and that he had searched in it but could not find them; he added, however, that he thought they were somewhere in his possession, but he had searched only in the box for them: this was *Holden* not sufficient to fit in secondary evidence of the letters. 2 Car. & P. 400. So when it was proved that a party to a cause, upon receiving a certain letter, gave it to his daughter to keep, and a witness proved that he and the daughter searched for it in a place where she kept her father's letters, but could not find it: this was *Holden* not to be sufficient, without calling the daughter as a witness. 1 Car. & P. 282. If indeed the father in this case had kept the letter, instead of delivering it to his daughter, a search for it amongst his papers, by some person employed for the purpose, would have been sufficient, because no better evidence could reasonably be expected. Per Best, C. J. *Id.* So where, upon the trial of an appeal against an order of removal, the question was whether the respondent had sufficiently accounted for the non-production of an indenture of apprenticeship, so as to let in parol evidence of its contents; it was proved that there had been two parts of it, one given to the parish officers (which was proved to have been destroyed,) and the other given to the master, who afterwards upon his assigning the apprentice to a Miss Taylor, gave it to her; and that upon application to Miss Taylor for it, she said she could not find it, and did not know where it was; but she was not at the trial, nor had she been subpoenaed; the court held that, as Miss Taylor was not called as a witness, there was no evidence that the part of the indenture she had, was lost or destroyed, and that therefore parol evidence of the contents of the indenture could not be received. 6 T. R. 236. In an action for a libel, charging the plaintiff with having set fire to his house in order to defraud an insurance company, it was proved by an agent for the insurance company, for the purpose of letting in secondary evidence of the policy on the part of the plaintiff, that, upon the fire happening, the policy was delivered to him, and that afterwards upon the loss being settled, and the plaintiff making a fresh insurance, he thought the old policy a useless paper, and he did not know what became of it (having searched for it and not being able to find it,) but he rather thought he must have returned it to the plaintiff; and a clerk to the plaintiff's attorney proved that he searched for the policy in all the places pointed out to him by the plaintiff as those where he kept his

papers, and also in such other places on the plaintiff's premises in which it was at all likely to be, without being able to find it; the court held that this was abundant proof to let in secondary evidence of the policy, and that as the policy was no longer of value, and therefore not likely to be kept, they thought that, even less evidence would have been sufficient. 3 B. & Ald. 296. Upon a new trial of an action on a written guarantie, the plaintiff's attorney proved that it had been produced at the former trial, that upon the motion for a new trial being discussed in the Court of Exchequer, Hullock, B. desired to see it, *and it was handed up to him, but the attorney had not seen it afterwards, and that search was made for it at the chambers and house of the Chief Baron without effect: it was objected that search should have been made at the chambers and house of Mr. Baron Hullock, to warrant the plaintiff in offering secondary evidence of it; but Lord Lyndhurst, C. B. held, that a search at the chambers or houses of the judges was unnecessary, as it must be presumed that it was immediately handed back to the party who produced it: and he allowed a copy to be given in evidence. 6 Car. & P. 74. In an action for maliciously charging the plaintiff with an offence before a magistrate, the magistrate proved that he had taken the defendant's examination in writing, and had given it either to the clerk of the peace or his deputy at session; and the clerk of the peace proved that he had searched for it and it was not among his papers, but that a bill of indictment for the offence had been preferred and ignored by the grand jury, and in such cases it was usual to throw away or destroy the papers relating to the charge; it was contended that this was not sufficient to let in secondary evidence of the examination, without also calling the deputy clerk of the peace as a witness; but the court held that as the examination was deemed a useless paper after the bill was ignored, and as the clerk of the peace was the proper person to have the custody of it if it were in existence, sufficient had been done to warrant the allowance of secondary evidence. 2 B. & C. 494. 8 D. & R. 669. See also 1 Car. & P. 133. So in a settlement case, where, in order to account for the non-production of an indenture of apprenticeship, it was proved by the pauper's mother, that about twenty-four years ago she received money from the parish officers of Stourbridge, to put her son out apprentice, and that she accordingly bound him by indenture to one Clay; that she gave the indenture to the wife of one W. Badger, a market gardener, who was in the habit of attending the market at Stourbridge, to give to the overseers there, but that Badger and his wife had since died, the wife last; evidence was then given that the parish chest had been searched, but no such indenture had been found; and that Badger's executor, upon being

applied to, stated that no such indenture was in his possession, or in the possession of Badger at the time of his death: the court held that this was sufficient evidence of the destruction or loss of the indenture, to let in secondary evidence of its contents; as it was the duty of the parish officers, upon the delivery of the indenture to them, to place it in the parish chest, and as upon search it was not found there, the presumption was that it was lost or destroyed. 8 B. & C. 98. So, in a similar case, where a witness proved that, hearing that the indenture was in the possession of the pauper (who was then very ill and shortly afterwards died,) he called upon him to make inquiry about it, and he told him that when the indenture expired it was given to him and he burnt it; it was proved also that inquiry was made of the executrix of the master, who said she knew nothing about it; but it did not appear that any search for it had been made among the papers of the master or of the pauper: the court held this to be sufficient; it *was not perhaps sufficient as proof of the actual destruction of the indenture by the pauper, but it was sufficient to discharge the party of laches in not making further inquiry. 4 M. & S. 48. And in a similar case, it was proved that the pauper (who was since dead) had served one Benson, a shoemaker, for three years and then ran away; that afterwards a fire took place in the house where he lived, and burned all he had; that his father and mother were dead, his master and his wife dead, and left neither property nor relatives; and as secondary evidence of the apprenticeship, it was proved that the pauper served Benson in the character of an apprentice, did the same work and received the same treatment as the other apprentices; and one witness said that he had seen in the master's hands an indenture, which he understood to be the pauper's indenture of apprenticeship: the court held that sufficient evidence was given, to warrant the proof of the indenture by secondary evidence, and that the secondary evidence given was sufficient, as raising a fair presumption that the pauper served as an apprentice. 4 D. & R. 475. So, in a settlement case, where to prove an apprenticeship thirty-seven years before, the indenture not being produced, it was proved that there were two parts of it, one given to the master, one to the father of the apprentice; that the father gave his son Buckley to get enrolled, and had not seen it since; that the master gave his part to one Standen, to whom he assigned the apprentice, and Standen gave it either to A. and B. his attornies, or to Buckley; Buckley's executrix proved that she had searched among his papers, but could not find either part of the indenture; A. proved that he had searched among his papers, and no such indenture was found; B. was dead, but a clerk of his executor proved that two boxes of his

papers came to the hands of the executor, and that he had searched in these boxes, but the indenture was not there : it was objected that this was not sufficient without calling B's executor ; but the court held that, considering the length of time that had elapsed since the indentures were executed, sufficient diligence seemed to have been used to obtain the primary evidence, in all quarters where it might reasonably be expected to be found, so as to let in secondary evidence of the indenture. 6 D. & R. 147. So, where the pauper had been bound an apprentice to one Fowle, who kept the indenture ; Fowle failed in business, and an attorney got possession of his papers ; upon the trial of the appeal, in order to lay a foundation for secondary evidence of the indenture, Fowle being dead, a search for the original among his papers by the attorney, without success, was proved, but no inquiry had been made for it of Fowle's widow, who was still alive : the court held this to be sufficient, as the widow was not executrix or administratrix to her husband. 3 B. & Ad. 460.

But it is only where the original, if forthcoming, would be receivable in evidence, that secondary evidence can be given of its contents ; and therefore, where it appeared that land had been holden under a written agreement, which was not stamped, and which had been lost, and it was proposed to give secondary evidence of the rent reserved by it, in order to prove the yearly value *of the land : the court held that it could not be done. 3 B. & Ald. 588. So in all cases to be proved by a written instrument requiring a stamp, if it appear that it was not stamped, it seems no evidence whatever can be given of the contents of the instrument, even although lost or destroyed : 2 Barn. & Ald. 478 : parol evidence cannot be given of the matter of agreement &c., because it was reduced to writing ; nor of the written instrument, because if the instrument itself were produced it could not be received in evidence for want of a stamp. But where two parts of an instrument are prepared, but one only is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents, if the other party refuse on notice to produce the stamped part. 1 Taunt. 507. So, where, in covenant, the deed declared upon (which was executed by the defendant only) being lost, the plaintiff gave notice to the defendant to produce the counterpart, which was executed only by the plaintiff ; at the trial, the plaintiff tendered in evidence a copy of the deed, upon which the defendant produced the counterpart, and insisted that the copy could not be received, as the counterpart was in existence and forthcoming, and that the counterpart could not be given in evidence, it being unstamped ; but the court held that it was not necessary that the counterpart should be stamped, as it was not the

deed declared upon, but was to be used only as a copy of such deed and as secondary evidence of it. 3 Bing. 292. see 2 Car. & P. 97, 8. C. and see post.

Notice to produce.] What has just now been stated as to the admissibility of secondary evidence, has reference only to cases where the original instrument is not in the hands of the opposite party; but if it be in the hands of the opposite party, then upon serving him or his attorney with a notice to produce it, he must produce it at the trial, or, upon his failing to do so, the party giving the notice, after proving the service to it, may give secondary evidence of the instrument. So, if the original instrument be in the hands of the banker, (2 Car. & P. 520.) or agent, (1 Car. & P. 582,) of the opposite party, you may in like manner give the party or his attorney notice to produce it, and it is not necessary in such a case to call the banker or agent as a witness. So, in an action against a sheriff, where it appeared that the warrant upon a writ of execution had been returned by the officer to the under-sheriff notice to produce it, given to the sheriff's attorney, was deemed sufficient. 3 Bing. 164.

There are some exceptions, however, to this: First, it is not necessary to give a notice to produce a notice; 1 Esp. 455. 4 Id. 203; for if that were necessary, it would be equally necessary to give a third notice to produce the second, and a fourth to produce the third, &c. &c., which would be absurd. Therefore it is not necessary to give notice to produce a notice to quit; see 2 Camp. 110. 601; unless perhaps in cases where it is attested by an attesting witness, in which case, if produced upon notice, it should be proved by him. See 2 M. & S. 62. Even notice of dishonour of a bill of exchange or promissory note, although contained in a letter, *may now be proved by a duplicate original or copy, or other evidence, without giving notice to produce the original, 2 Camp. 601, 599. 1 Stark. 28. 3 B. & B. 288, although formerly ruled otherwise. See Peake R. 221. But if it be necessary to prove such a notice of dishonour, not in an action on the bill or note, but collaterally in another action, that, it seems, is not within this exception, but is within the general rule above mentioned, and a notice to produce such notice must be given and proved. Moody and M. 31. So where an action was brought against a surety, who had undertaken to pay any balance due from B. to A. within six months after notice, and to whom notice was accordingly given: it was holden by Lord Ellenborough, C. J., that no evidence could be given of the notice unless a notice were previously given to produce it, for it was not properly a mere notice, but a statement of the account between A. and B. 2 Stark. Rep. 174. Secondly, the demand of the copy of a warrant,

In an action against a constable, may be proved by a copy, without giving notice to produce the original. 2 B. & P. 39. Thirdly, in an action on an attorney's bill, a copy, or rather duplicate, of the bill, is sufficient evidence, without notice to produce the original bill which was delivered: 2 B. & P. 237. 3 Esp. 167. 6 Car. & P. 71; but the bill, in such a case, can be proved only by such copy or counterpart, and not from the attorney's books. 2 Camp. 110. Fourthly, in trover for a written instrument, parol or other evidence may be given of the instrument, without giving notice to produce it. 14 East, 274. see 1 Esp. 50. cont. Thus, in trover for the certificate of a ship's registry, it was holden that the certificate might be proved by the production of the registry from which it was copied, though no notice was given to produce the certificate itself. 3 B. & P. 148. So in trover for a bond, it was holden that the plaintiff might give parol evidence of it, to support the general description of the instrument in the declaration, without giving notice to produce the original. 14 East. 274. So, in trover for an agreement, Gibbs, C. J., said that it was not necessary to give a notice to produce it. 4 Taunt. 867. 868. Fifthly, where an action on the money counts, with a count for interest, was brought to recover a balance due on a bill of exchange, which was in the hands of the defendant, and an admission by the defendant that he owed the balance was given in evidence: it was contended for the defendant that as the bill was the foundation of the action, notice should have been given to produce it; Abbott, C. J., however, held that such notice was unnecessary, but said that unless the bill were produced, he would desire the jury not to give interest. Ry. & M. 145.

The notice may be in the following form:—

In the King's Bench, ["Common Pleas," or "Exchequer of Pleas."]

John Nokes, Plaintiff,

and

Joseph Styles, Defendant.

Take notice, that you are hereby required to produce to the court and jury, on the trial of this cause, [a certain deed, dated " &c." and "made between " &c., describing the deed or other instrument, letters, papers, books &c., that you desire the opposite party to produce in evidence at the trial,"] and all other letters, books, papers, and writings whatsoever, in anywise relating to the matters in question in this cause. Dated this —day of—— 1830.

Yours, &c.

C. D., [defendant's]

attorney [or "agent"]

To Mr. John Nokes, the above-named [plaintiff.] and to Mr. A. B. his attorney [or "agent."]

This notice must be served such a reasonable time before the trial, that the person, upon whom it is served, may have an opportunity to search for or procure the instrument required, and produce it at the trial if he think proper to do so. And therefore, where a notice to produce certain bills of exchange (which were not the subject of the action,) at a trial in London, was served upon the defendant's agent in town, on the day but one before the trial, the agent not having them in his possession, and the defendant residing in Staffordshire: Tisdal, C. J. held that the service was too late; if indeed the bills were so necessarily connected with the transaction, which was the subject of the action, as to make it a natural conclusion that they were in the possession of the attorney, the notice might be sufficient; but that was not the case. *Moody & M.* 335. 334, n. So where an action was brought against a lady, as one of the shareholders in a mining company, and it was proposed to prove her a partner by her letters, in which she made mention of her shares, addressed to one of the directors, and afterwards returned by him to her; and notice to produce these letters was given to the defendant's attorney between seven and eight o'clock on the Saturday evening previous to the trial, which came on Wednesday, the defendant, although usually residing in London, being at the time in Scotland; it was contended that this notice was sufficient, on the ground that the defendant must be supposed to have left with her attorney all papers necessary to the conduct of the trial; but Lord Tenterden, C. J., said, that although that is the case, where a party is abroad, (and he was not sure whether it ought to be extended to cases where the party resides in England,) yet at all events the papers must appear to be evidently connected with the cause, to render such a notice sufficient, and which in this instance he thought was not so. *Moody & M.* 97. 96. and see 5 Car. & P. 522. In such a case, however, the paper required may probably be already in the hands of the attorney, who is bound to produce it; and the attorney may be examined as to the fact whether he has it or not, in order that if he admit he has it, and refuse to produce it, secondary evidence may be given of its contents. *Moody & M.* 235; cor. Best, C. J. Where a notice to produce deeds was served on the defendant's attorney in Essex on Saturday, (the commission day of the assizes being Monday,) and the attorney went to London and fetched them; afterwards on the Monday evening a notice was served upon him to produce another deed, and the attorney offered, that if the plaintiff would pay the expense of sending for it to London, where it then was, it should be *produced; but no offer to pay the expense was made, and the deed accordingly was not produced; the court, under the circumstances of the case, held that the notice was insufficient; the de-

defendant had already been at the expense of his attorney's journey to London for the other deeds, and they thought he was justified in refusing to comply with the second notice, as the plaintiff declined paying the expense. 3 B. & Ad. 182. Where the defendant was a foreigner usually residing abroad, a notice to produce letters written to him whilst abroad several years before, was served on him in London on Saturday the 10th of April, the cause coming on for trial on the 14th: it was objected that time should have been allowed him to send for the letters; but Abbott, C. J. said, that as it would lead to great inconvenience and delay, if trials were to be postponed upon objections such as this, it would be dangerous to hold that secondary evidence should not be admitted in such a case; he accordingly ruled that secondary evidence might be given of the letters. Ry. & M. 47. So, where a party went abroad before an action brought against him, and a notice was given on the 13th to his attorney, to produce at the trial, which was to be on the 15th, a letter written to his client three years before: Abbott, C. J. held that the notice was sufficient; a party leaving the country, and putting his cause into the hands of his attorney, must be presumed to leave in his hands all papers material to the cause, and the letter in question was most material. 2 Car. & P. 126. 125.

But in order to give effect to a notice to produce, it must appear, either expressly, or from circumstances from which the court may fairly presume it, that the original document is in the hands of the party who is required to produce it, or of his agent, &c. See ante, p. 382. As for instance, where a letter is sent to a party, and he returns an answer to it, it is to be presumed that the letter still remains in his hands. So, if a letter be proved to have been sent to a party by post, and it is not returned, the presumption is that it has reached him, and that he has it. But where in such a case it was merely proved that such a letter was copied into the letter book, and that the practice of the office was, that the clerk who copied such letters gave them to the principal to seal, who then gave them to a clerk to take to the post-office, but whether it was so done in that particular instance could not be proved: Lord Tenterden, C. J., held that this was not sufficient to let in secondary evidence, upon the original not being produced on notice. Moody & M. 129. So, in an action against an executrix, Best, C. J., ruled, that proof of a letter being sent to the testatrix some years before her death, was no proof that it reached the hands of her executrix. 2 Car. & P. 198. In an action by the secretary of a charitable institution (which had been dissolved,) against three only out of several members of the committee, for his salary, it became necessary to produce the book of resolutions of the society, which the plaintiff had given the defendants notice to

produce; but because there was no proof that the book had ever been in the possession of the defendants, but merely of another member of the committee, who might have been compelled to attend with it by a *subpœna duces tecum*, if the plaintiff thought fit, the court held that secondary evidence could not be given of an entry in it, upon its not being produced in pursuance of the notice. 10 Bing. 395. Where a man sold a horse under a written warranty of soundness, and his son, who was in his service, afterwards obtained possession of the warranty by a fraudulent contrivance; in an action against the father on the warranty, Best, C. J., held, that as there was no evidence that the son acted as the agent of his father in the transaction, although he was present at the time of the sale, a notice served on the defendant to produce the warranty, did not enable the plaintiff to give secondary evidence of its contents. 1 Car. & P. 632. Where a notice was given to produce a letter, and it was proved, by the attorney of the party required to produce it, that it was filed in the Court of Chancery, in pursuance of an order of that court, in a suit between the same parties: Abbot, C. J., held that no secondary evidence could be given of it, upon its not being produced upon notice; the letter was as much in the power of one party as the other, as either might, upon application to the Court of Chancery, have obtained permission to produce it. Ry. & M. 18.

Where there has been a notice to produce, the party giving it, may afterwards, at the trial, call for it or not, at his discretion: if he do not, the opposite party cannot in any way compel him to make it a part of his evidence. In an action of covenant, the plaintiff having lost his part of the deed, which was duly stamped, gave the defendant notice to produce the counterpart, which was not stamped; at the trial, however the plaintiff, instead of calling for the counterpart, (which was in court and ready to be produced;) gave secondary evidence of the lost deed from the draft of it, which was objected to by the defendant, on the ground that the counterpart was the best secondary evidence of the deed; but Best, C. J., overruled the objection, and the court afterwards held that the draft had properly been received in evidence. 2 Car. & P. 97. If the document mentioned in the notice be called for, the opposite party must at once make up his mind whether he will produce it or not; for if he decline to produce it when called for, he will not afterwards in the course of the cause be allowed to make use of it for any purpose whatever. Where notice had been given to a defendant to produce a receipt, and he declined to produce it at the trial when called for, in consequence of which a witness gave parol evidence of its contents; in cross-examination of this witness, the defendant's counsel put the receipt into his hands, and proposed to ask him at what time an

interlineation in it was made : but Alderson, B., held, that as he refused to produce it when called for, he could not be allowed to produce it afterwards ; a party, called upon by notice to produce a document, must produce it when it is called for or never. 6 Car. & P. 525. But if not produced when called for, the only effect of its non-production will be, that the party who gave the notice may then give secondary evidence of its contents. And on the other hand, the production of the document when called for, will not have the effect of making it evidence for the other party ; it is still open to *objection for any interlineation or other defect appearing upon the face of it, 6 Car. & P. 525, or to the objection that it is not legal evidence in the cause. 3 Car. & P. 103. So, if the document be not produced when called for, and the opposite party propose to give secondary evidence of its contents, it may be opposed, if it appear sufficiently from the notice or otherwise that the original document, if forthcoming, would not be evidence. See 3 Car. & P. 103.

Subpœna duces tecum.] If a deed or other original document, which is necessary evidence in a cause, be in the hands of a person who is not a party to the cause, the party requiring its production may serve the person who has it with a *subpœna duces tecum* to produce it. And if afterwards at the trial he appear, but object to the production of the document, for a reason which the judge may deem sufficient, as if he state it to be one of his own title-deeds, or that he is an attorney, and that it is the title-deed of his client, in which case he cannot be compelled to produce it, then the judge upon application will allow the party to give secondary evidence of its contents. 6 Car. & P. 728, cor. Parke, B. ; 1 Car. & P. 161, Abbott, cor. C. J. So, where a witness, who had been subpoenaed to produce a letter, stated in his examination at the trial, that after action brought he gave it to the opposite party, who said he wished to give it to his attorney ; upon this, the attorney was called upon to produce the letter, and it not being produced, Lord Kenyon, C. J., allowed the other party to give parol evidence of its contents. 4 Esp. 256.

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* CHAPTER II.

WRITTEN EVIDENCE.

SECT. 1. *Records.*2. *Mutters quasi of Record.*3. *Written Instruments of a Private Nature.*

SECT. 1.

Records.

Statutes.] Public statutes, the rules of the common law, and the general customs of the realm, are never required to be proved at the trial, for the same reason that they are not set forth in the pleadings, namely, because the court are bound *ex officio* to take notice of them; (a) and therefore, when the printed copy of a †public statute is produced at a trial, as is frequently the case, it is not to be deemed to be produced as evidence, but rather in aid of the memory of the court and jury. See Gilb. Ev. 10. By stat. 41 G. 3, c. 90, s. 9, the statutes of Ireland prior

(a) The proceedings in an action form a complete hypothetical syllogism. As thus :—" If any man take the goods of another, without lawful excuse, he shall pay to the other such damages as he may have sustained by reason of the said taking : But J. S. took such and such goods from J. N., without lawful excuse ; and J. N. hath thereby sustained damage to the value of 10l. : *Therefore* J. S. shall pay to J. N. the sum of 10l. being the amount of the damages the said J. N. hath sustained by reason of the said unlawful taking." The major proposition here is always either a statute, or a rule of the common law, or some general or special custom : the minor proposition is made up of the pleadings, evidence and verdict ; and the judgment of the court is the conclusion. When the major proposition consists of a private statute or particular custom, it is set out in the declaration ; and the proceedings then form the ordinary hypothetical syllogism, such as that now mentioned. But when a public statute, or a rule of the common law, or a general custom of the realm, constitutes the major proposition, the syllogism is then what logicians term an *enthymem*, that is, a syllogism consisting of the minor and conclusion only, the major proposition being understood.

So, where a plea, replication or other pleading, consisting of a confession and avoidance, is put in issue, the issue, verdict and judgment may be reduced to a syllogism in the like manner.

the union, printed and published by the king's printer, shall be received as conclusive evidence in any court of Great Britain. These however are the statutes of another kingdom. But the statutes relating to Ireland, which have been made since the union, are taken notice of *ex officio* by the court, and need not be pleaded or proved.

Private statutes and particular customs, on the contrary, must be proved at the trial, for the same reason that they are required to be set forth in pleading. A private statute must be proved by an examined copy; Gilb. Ev. 12. see 1 Arch. Pr. C. P. 130. and see 12 East, 479; unless it be otherwise directed by the statute itself. See 10 Bing. 404. but see Moody & M. 421.

Private statutes may be given in evidence, not only when the matter of them is directly put in issue, but also if they become necessary incidentally. As where the issue was whether certain lands passed by a grant of King Henry 8, the defendant was allowed to give in evidence a private statute, 35 H. 8, by which it is enacted, that lands should pass by that king's grants, notwithstanding any misrecital of them in the patents. Hob. 226, 227. Gilb. Ev. 42. Also, where the printed copy of a public statute was produced, as proof of certain facts recited in the preamble, the court held that it was admissible evidence for that purpose. 4 M. & S. 532.

The distinction between public and private statutes is this; a general or public act is an universal rule, that regards the whole community; but special or private acts are rather exceptions than rules, being those which operate upon private persons and private concerns. 1 Bl. Com. 86; Gilb. Ev. 45. If a statute relate to all the subjects of the realm, it is a public statute. 8 Co. 138. But a statute which relates to particular persons, see 1 Salk. 168, or to particular places, as to one or more particular manors or towns, &c., 4 Co. 76 b., Skin. 350, or to one or more particular counties. 4 Co. 76 b., as for instance the stat. 3 J. 1, c. 5, which gives the benefices of recusants in particular counties to the universities, R. 10 Co. 57, c., and the stat. 18 El. c. 6, relating to colleges in the universities, 4 Co. 76, a., and the like, are private statutes. All statutes which concern the king, R. 8 Co. 28, a. R. 4 Co. 13. 77, a. Hob. 227, or the queen, 8 Co. 28 b. Plowd. 281, a. or the prince, their eldest son and heir, R. 8 Co. 28, b., are public statutes. See 8 B. & C. 743. But a statute, by which all corporations or licences granted by Henry 6 are declared to be void, was holden a private statute. Plowd. 65; 13 E. 4, 8. b. A statute relating to all spiritual persons, such as the stat. 21 H. 8, c. 13, stat. 13 El. c. 10, stat. 18 El. c. 11, and the like, is a public statute; R. 4 Co. 76, a. 120, b. 1 Brownl. 208. 2 Ro. Abr. 465; but a statute which concerns a part of the spirituality only, such as

bishops, or any particular bishop, is a private act. 4 Co. 76, a. R. 5 Co 2, a. 13 Ed. 4, 8, b. A statute that relates to all lords, such as the stat. Marl. c. 3, 4 Co. 76, b. 10 E. 4 7, b. Gilb. Ev. 45, or the stat. 2 R. 2, c. 5, *de scandalis magnatum*, R. *4 Co. 13, is a public act; but a statute which concerns one set of lords merely, such as the lords temporal, is a private act. 4 Co. 76, b. 13 E. 4, 8, b. Duct. Pl. 229. A statute that relates to all officers in general, such as the stat. Westm. 1, c. 26, that no sheriff or other minister shall take reward. &c., is a public act; but a statute which concerns a particular set of officers, such as sheriffs or the like, is, it seems, a private act, 4 Co. 76, b.; 8 Saund. 154; Plowd. 65; 1 Sid. 24. 439; Cont. per Holt, 1 Lev. 63; Semb. cont. per Hale, 3 Lev. 103. However the stat. 23 H. 6, c. 9, as to sheriff's bonds, whatever doubt might formerly be entertained about it, as appears from the authorities just cited, is now decidedly treated as a public statute; for since the sheriff has been enabled to assign such bonds by a public statute, the court feel themselves bound officially to take notice of the statute that enables him to take such bonds. 2 T. R. 569. 15 East, 322. A statute which relates to trade in general, is a public act; but if it concern a particular trade merely, or an individual of that trade, it is a private act. 4 Co. 76, b. see 2 Lutw. 1410. But if a statute relating to a particular trade, create a penalty and give that penalty to the king, it thereby becomes a public act. Skin. 429. So, all statutes relating to the public revenue, Bac. Abr. Statute F. 12 Mod. 249, or to the king's forests or chases, &c. 8 Co. 138, b. are public acts. So, although a statute relate to a particular matter, yet if it concern all persons generally, as a statute concerning elegits, assizes, appeals, &c., it is a general act. 4 Co. 76, b. So although the words of a statute be particular, yet if the intent be general, it is a public statute; 10 Co. 101. 1 Sid. 209; and on the other hand, if the intent of a statute be particular, it shall be deemed a private act, notwithstanding the words are general. Plowd. 204. So part of a statute may be public, part private. R. 10 Co. 57, b. So, if a statute, which would otherwise be private, contain a clause directing that it shall be deemed a public act, and which is very usual, it must be treated accordingly; and in such a case, it is not necessary to prove it by an examined copy. 10 Bing. 404, but see Moody & M. 421, cont.

By the concluding section of a local act, it was enacted, that the act should be deemed and taken to be a public act, and should be judicially taken notice of as such, without being specially pleaded; it was holden, that a printed copy was admissible in evidence, without proof that it had been examined with the parliamentary roll, or printed by the King's printer. *Woodward v. Cotton*, 4 Tyr. 689.

Where A. brought ejectment against a mortgagor in possession, and recovered, and afterwards the mortgagee brought ejectment against A.; held, that the judgment in the first ejectment was not admissible in evidence for A. *Doe v. Webber*, 1 Ad. & E. 119.

Where A. being seised of two closes, conveyed one to B.; both A. & B. being disseised by C., brought ejectments, and recovered; B. was a second time disseised by C., and he again brought an ejectment, and at the trial tendered in evidence the testimony which a witness (since deceased) had sworn upon the trial of A's ejectment: held, that such evidence was not admissible; to make it evidence for B., he must have derived his title from A. subsequently to the former verdict. *Doe v Earl of Derby*, 1 Ad. & E. 788.

Records of the King's Courts.] A record is proved, either by producing the record itself; or by an exemplification of it under the great seal, which is of itself a record, and needs no further proof; Gilb. Ev. 14. 10 Co. 93; or by an exemplification of it under the seal of the court, (whether of a court at common law or of one created by act of parliament, 2 Sid. 146; Gilb. Ev. 19, 17; 10 Co. 98, and see Hardr. 120.) and which also needs no further proof; Gilb. Ev. 19; or by an examined copy; 10 Co. 92, b.; 2 Rol. 678, l. 49; R. Hardr. 119; according to circumstances.

If *nul tiel record* be pleaded, and it be a record of the same court, the record itself must be produced. See Arch. Pr. C. P. 312. But if it be a record of a superior court, (as if in an action in the Common Pleas a record of the Court of King's Bench be pleaded and put in issue,) as in such a case the judge of the inferior court cannot send for the record, it must be done through the medium of the Court of Chancery; that is, a certiorari must be sued out with the cursitor, directed to the Chief Justice of the King's Bench, requiring him to certify the record to the Court of Chancery; and the record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by *mittimus* to the inferior court, to be there used as evidence. See Gilb. Ev. 14, 15. 1 Arch. Pr. C. P. 130. If however it be a record of an inferior court, (as if in an action in the Court of King's Bench a record of the Common Pleas be pleaded and put in issue, an exemplification may be obtained, without the intervention of the Court of Chancery, thus: sue out a certiorari, either with the cursitor, or with the proper officer of the superior court, directed to the chief justice, judge, or officer of the inferior court, in whose custody the record is supposed to be, requiring him to certify the record to the superior court; and thereupon an exemplification of the record, under the seal of the inferior

court, will be transmitted to the superior court, to be there used as evidence. See 1 Arch. Pr. C. P. 314.

But, in all other cases, where *nul tiel record* is not pleaded, but where issue is joined on matter of fact, and matter of record comes in question merely collaterally, the record must be proved by an examined copy; Gilb. Ev. 26; as to the manner of obtaining which, see 1 Arch. Pr. C. P. 131. A copy of such examined copy, however, is no evidence. Gilb. Ev. 9. Nor is the judgment book in the Common Pleas evidence of a judgment therein entered, though the record have not been made up, and the person interested in proving the judgment be no party to it. 2 New Rep. 274. 3 Car. & P. 192. Nor shall an officer or other person be examined as to the contents of a record: although he may, as to the condition in which the records are, in such a place, generally. 1 Str. 210. But if a record be lost, an ancient copy, we have seen (ante, p. 375,) may be given in evidence, without proving it to have been examined with the original. See Harar. 324. Hardw. 304. Or if the record be modern, the court upon application will allow it to be supplied by a new entry. 2 Bur. 722. 2 Str. 833. 2 Arch. Pr. C. P. 287. So, if the *nisi prius* record with the postea indorsed, be lost, the court will allow a new one to be made out from the issue roll, and the associate's notes, 2 Str. 1264. 2 Arch. Pr. C. P. 286, or allow the party to give secondary evidence of its contents. 2 Car. & P. 445. 440.

An office copy, (that is, a copy made out by the officer in whose custody the record &c. is,) is also in some cases evidence, without proof of having been examined. The rule upon the subject, is this: if an officer be authorized by law to deliver out copies of records, &c., to the parties, his office copy is evidence without further proof; but if it, in strictness, form no part of the duties of his office to make out such copies, although he actually do make them for the convenience of parties and their solicitors, such copies are no evidence, unless they are proved to have been examined with the record. Gilb. Ev. 23. Thus, an office copy of a judgment is no evidence; for the officer is not authorized to make it. Id. 25. But the chirograph of a fine is evidence; for it is the duty of the officer to make out copies of the concords lodged with him of record, for the parties. Plowd. 110, b. Gilb. Ev. 24. Bul. N. P. 229. So, an office copy of a rule of court is evidence; for it is the duty of the clerk of the rules to make out a copy for the parties. 1 Ld. Raym. 745. 1 Camp. 102. 471, n. So, an office copy of depositions sworn before a judge is evidence; for it is the duty of the judge's clerk to make out such copies. 1 Camp. 101. So, the indorsement of enrolment upon a deed enrolled, is evidence, because the officer is authorized to make it; but if the deed be lost, an office copy of the enrol-

ment is no evidence, without proving it to have been examined, for it is no part of the officer's duty to make it. Gilb. Ev. 24, 25.

It is a general rule that where a copy of record is given in evidence, it must be a copy of the whole record; because the omission of part, might have the effect of altering the sense and import of the residue. Gilb. Ev. 23. 3 Inst. 173. Thus, to prove a verdict, you must give in evidence an examined copy of the whole record, including the judgment; Bul. N. P. 234. Gilb. Ev. 37; for otherwise it would not appear but that judgment had been arrested or a new trial granted. Bul. N. P. 234. 1 Str. 162. This rule however does not hold in the case of a verdict on an issue out of Chancery, because it is not usual to enter up judgment in such a case; and the decree of the Court of Chancery is equally proof that the verdict was satisfactory and conclusive. Bul. N. P. 234; Bac. Abr. Evidence, F. So, if it be required to prove merely that a trial was had between the parties, Barnes, 449, or even the amount of the damages given, 2 Stark. 364, the *nisi prius* record, with the *postea* indorsed upon it, and regularly stamped and marked, is sufficient evidence for that purpose. If a witness swear to certain facts at a trial, and afterwards die before a second trial between the same parties, what he swore at the first trial may be given in evidence at the second, and may either be read from the judge's notes, or proved upon oath from the notes or recollection of any person who was present at the former trial; 3 Taunt. 262; 12 Mod. 318; Gilb. Ev. 68, 69; and even in a case where the witness was still alive, but did not appear at the second trial, after having been subpoenaed and his expenses paid him, the court said they would presume that he was kept away by the practice of the other party, and they accordingly allowed evidence to be given of what he swore at the former trial. Bul. N. P. 243. But in these cases, in order to let in such evidence, it must first be proved that the former trial took place; and this can be done only by giving in evidence an examined copy of the record, Gilb. Ev. 68, or the *nisi prius* record with the *postea* indorsed, and regularly stamped and marked as above mentioned, 1 Str. 162, or with the officer's memorandum of the verdict on it; Moody & M. 315; or if it cannot be found, it may be proved by secondary evidence. Scmb. 2 Car. & P. 440, and the same in all other cases, where it may be necessary to prove what a man swore at a former trial, or that a former trial was had. In an action for words spoken of an attorney with reference to his conduct in the management of a former cause, the proceedings in that cause must be proved by the production of such proceedings, or by a copy of the roll if the *cause had advanced so far, although all

the papers be in the hands of the defendant, who has had notice to produce them. 1 Esp. 390.

A judgment is in no case conclusive, unless pleaded by way of estoppel; but if not so pleaded, yet if it be between the same parties, it is evidence to go to the jury: per Parke, B.; and therefore a judgment for defendant in ejectment, was holden to be admissible evidence for him in another ejectment by the same lessor of the plaintiff. *Doe v. Seaton*, 1 Tyr. & Gr. 19.

A former verdict may be given in evidence in a second action between the same parties, Gilb. Ev. 29, and see 1 Stark. 348. 2 Camp. 19. Doug. 517. 5 Esp. 58. 56, whether it be for the same land or not; Gilb. Ev. 30; or in the same form of action or not; 5 M. & S. 64. 4 Co. 94, b. 2 Bl. 827; and it is conclusive evidence in all cases where it has the effect of and is pleaded as an estoppel. See ante, p. 203, 210, 211. The rule is this: the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea or as evidence, conclusive between the same parties, upon the same matter directly in point in another court. And the judgment of a court of exclusive jurisdiction directly on the point, is in like manner conclusive between the same parties, upon the same matter, whether directly in point, or coming incidentally in question for a different purpose, in another court. But a judgment is no evidence of a matter which came collaterally in question merely, whether the court be of concurrent or exclusive jurisdiction; nor is it evidence of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment. Per De Grey, C. J., 11 St. Tr. 261. 2 Bac. Abr. Ev. F. Bul. N. P. 244. Where in trespass *quare clausum fregit* by A. and B. against C. and D., a judgment in ejectment on the separate demises of A. and B. against the defendant and others, being given in evidence for the plaintiffs, it was objected that as there was no joint demise, the record in the ejectment could not be evidence in the action of trespass, which was a joint action; but the court held that both records were perfectly consistent with the fact of A. and B. being tenants in common, and that the record in ejectment therefore was good evidence. 5 M. & S. 64. But where a defendant in the Palace Court, after judgment against him by default, removed the cause by *habeas* into the court of King's Bench, and there pleaded to a new declaration, it was holden that the judgment by default could not be given in evidence against him, for the removal of the cause had the same effect as if the proceedings and judgment in the court below had been set aside. 9 B. & C. 762.

And not only may the parties take advantage thus of a former ver-

dict, but their privies in blood or in estate may also give it in evidence. See ante, p. 210, 211, and 3 East, 346. Thus, if a termor recover against B., his reversioner may give the verdict in evidence in an action between him and B. Hardr. 472. Gilb. Ev. 33. Or if the verdict were against the termor, B. might in like manner avail himself of it in an action between him and the reversioner. Gilb. Ev. 35. But a recovery against a tenant for life by verdict, is no evidence against the reversioner; for he could not interfere in the action, unless upon *aide prier*. Hardr. 426, per Glynn. See 2 Car. & P. 445, 440. A verdict however in favour of a tenant for life, is evidence for the reversioner or remainder-man; so is a verdict in favour of a remainder-man, evidence for a person claiming a subsequent remainder under the same deed. 1 *Ld. Raym.* 730. A verdict against one man, is *good evidence against another to whom he aliens the land in question. 2 *Ro. Abr.* 680. 3 *Mod.* 142. Gilb. Ev. 36. So a judgment of ouster against one corporator, is conclusive evidence against another who claims title under him. 5 *T. R.* 66; 2 *Str.* 1109.

But a verdict is no evidence against a person who was neither party nor privy to the record, Hardr. 472, unless when given in evidence to prove a custom, *Bul. N. P.* 233. *Carth* 181. Gilb. Ev. 36. *Peake R.* 212, or a pedigree, *Bul. N. P.* 233. 2 *Str.* 1151, or the like. Even a verdict against one defendant, in an action against several, was not allowed to be given in evidence in a subsequent action against the others; because the latter could not have controverted the verdict by writ of attain. Gilb. Ev. 33. But a verdict, with the evidence given, in an action by a carrier against a stranger, for an injury to goods intrusted to him to carry, has been holden good evidence in an action by the owner of the same goods against the carrier. *Bul. N. P.* 243. See 1 *Stark.* 347, 348. per *Ellenborough, C. J.* and 4 *T. R.* 590. A judgment of condemnation *in rem* in the Exchequer, is conclusive evidence of the legality of the seizure, in a subsequent action against the seizing officer; 5 *T. R.* 256; but it is doubtful if a judgment of acquittal be conclusive evidence of the contrary. *Id.* In what cases a verdict or judgment must be pleaded by way of estoppel, see ante, p. 203.

A verdict against a defendant in a criminal case, 2 *Sid.* 325, or a conviction before a magistrate, 1 *Camp.* 9, whether founded on the sole testimony of A., *Id.* 4 *East*, 572. 1 *Taunt.* 520, or on the testimony of A. and others, 1 *Camp.* 151. See *Hardw.* 311. but see Gilb. Ev. 30, is no evidence for A. in any civil action in which he may afterwards be a party. But it is good evidence in actions by or against third persons; and therefore a conviction before a justice of peace having competent jurisdiction, upon which the plaintiff was arrested and imprisoned, is,

till reversed or quashed, conclusive evidence in favour of the justice, in an action against him for false imprisonment. 7 T. R. 633, n. and see 1 Brod. & Bing. 57. 432. A verdict of acquittal, however, is unexceptionable evidence for the party acquitted, and is among the ordinary proofs in an action for a malicious prosecution. See 2 Str. 1122. and see 2 Camp. 73. n. But an acquittal on an indictment for bigamy, has been holden to be no evidence in a civil action in which the validity of the second marriage was controverted; for it required much stronger evidence to convict the defendant on the indictment, than would be necessary to establish the illegality of the second marriage in a civil action. Gilb. Ev. 32.

In order to prove a writ, if it be the gist of the action, you must get it returned, and then procure an examined copy of it. See 1 Arch. Pr. C. P. 131. But if it be matter of inducement merely, it is not necessary that it should be returned, or proved by an examined copy; Gilb. Ev. 39; but the writ itself, if in your possession, may be given in evidence; or if in possession of the other party, then upon proving the service of a notice upon him to produce it, and that it has not been returned and filed, but was in the other party's possession after the day on which it was *returnable, you will be allowed to give a copy of it in evidence. 4 Esp. 160. See Hardr. 323. Alleyn, 18. The sheriff's return indorsed on it, is *prima facie* evidence of the facts therein stated as against the sheriff or between other parties; 11 East, 297. 2 Camp. 117; but it is no evidence for him. Semb. 2 Stark. 180. See 7 Taunt. 8. So the sum indorsed on a writ of mesne process, is evidence of the amount for which the party has been arrested or holden to bail. 5 B. & Ad. 848. But the sheriff's return to a *fi. fa.*, that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it in an action for money had and received. 1 M. & S. 599. As to the effect of a writ of supersedeas in evidence, see 5 M. & S. 76.

In an action against a sheriff for seizing goods under an execution, the warrant under the seal of office of the sheriff, issued by the undersheriff, is evidence sufficient to connect the sheriff with the acts of his bailiff. 7 B. & C. 585, n. But in an action against a bailiff for taking goods in execution, it is not sufficient for him to give in evidence the sheriff's warrant, but he must shew the writ of execution, and in some cases the judgment also. If the action be brought by the defendant himself, the judgment need not be proved; but otherwise, if brought by any other person claiming property in the goods. 1 Ld. Raym. 733. 5 Burr. 2631. 1 Doug. 41. 2 W. Bl. 1104. 1 Camp. 512. n. If a plaintiff, however, claim under a writ of execution, (as, for instance, in

an action of ejectment for property purchased of the sheriff under an execution,) it is necessary to prove the judgment as well as the execution. 2 Stark. 199. Holt. 589. 1 Marsh. 6. 1 Bing. 209. So in ejectment upon an *elegit*, the judgment, as well as the *elegit* and return, must be proved: Gilb. Ev. 9: it is not necessary however to produce a separate examined copy of the *elegit* and inquisition; as the award of the *elegit* and the inquisition must be entered on the roll, an examined copy of the roll is sufficient evidence, not only of the judgment, but of the *elegit* and inquisition also. 2 M. & S. 565. It cannot be objected to an execution, at *nisi prius*, that the judgment was not previously revived by *scire facias*. 4 Camp. 58.

A judgment of the House of Lords, is proved by an examined copy of it from the minute book. Cowp. 17. See 1 Arch. Pr. C. P. 131.

A conviction before a magistrate, is proved by an examined copy; see 5 Car. & P. 38; and if it recite the information, it is sufficient evidence of that also, *Id.* As to the proof of them in criminal cases, see Arch. Peel's Acts. Vol. 1. p. 456. Vol. 2, p. 70.

The record of an indictment is also proved by an examined copy; or the record itself may be produced. See 1 Arch. Pr. C. P. 131, 132. *Vide supra.* And for this purpose the record must be made up; for the indictment itself cannot be given in evidence. 8 B. & C. 341. See Ry. & M. 171. 5 Car. & P. 507.

To prove the passing of a fine, the chirograph is conclusive evidence without further proof; Ante, p. 391. Plowd. 110. b. Gilb. Ev. 24. Bul. N. P. 229; but if it be necessary to prove the *proclamations, it must be done by an examined copy. Gilb. Ev. 25. 6 Taunt. 485. See 5 B. & C. 696. 5 M. & S. 326. As to proof of an entry to avoid a fine, see 5 B. & Ad. 783.

A common recovery may be proved in the same manner as an ordinary judgment. See ante, p. 360; or it may be, and usually is, proved by the exemplification. Also by stat. 27 El. c. 9, the exemplification of a recovery in Wales or a county palatine, shall be of the same validity to all intents as the original record. The seisin of the tenant to the *præcipe* must be proved, unless the recovery be ancient, in which case the seisin shall be presumed. Gilb. Ev. 27, 28. 1 Mod. 117. and see ante, p. 364. Upon proof however that the record of a recovery cannot be found, or does not appear to be regularly entered, the deed making a tenant to the *præcipe* (duly proved) will of itself be sufficient evidence of the recovery by a purchaser of an estate, whereof a recovery was necessary in order to complete the title, if he have been in possession of the same for 20 years and from the period of the purchase. 14 G. 2. c. 20. s. 4.

To prove a deed which has been enrolled, the indorsement of the enrolment is evidence sufficient, without further proof of the deed; Gilb. Ev. 24. 97. 1 Salk. 280; and see 1 Doug. 56; but if the deed be lost, it can be proved only by an examined copy of the enrolment. Gilb. Ev. 25, and see ante, p. 140. This however must be understood of deeds only which need enrolment; for if any other deed be enrolled, (as for instance a bargain and sale for years, or the like,) and be afterwards offered in evidence, it must be proved in the ordinary way by the subscribing witness; because the officer had no legal authority to enrol it. Gilb. Ev. 99. 5 Co. 54. Style, 445. 1 Salk. 290.

To prove the memorial of an annuity, particularly as against a person in whose possession the original memorial is, an examined copy of the enrolment is sufficient *prima facie* evidence. 3 Camp. 20. See 3 Taunt. 540.

Letters-patent.] Letters-patent, we have seen, must be pleaded with a profert of the letters-patent themselves, or of an exemplification thereof, under the great seal. Ante, p. 141. In this manner also they must be proved; and the letters-patent, or such exemplification, are of themselves sufficient evidence, without further proof.

SECT. II.

Matters quasi of Records, &c.

Proceedings in Parliament.] Entries in the journals of the House of Lords and House of Commons, may be proved by examined copies from their minute books. Cowp. 17. Doug. 594. The journals of the House of Lords have been holden evidence to prove, not only the address of the Lords to the King, but the King's answer also. 5 T. R. 445. But the resolutions of either house, with a view to ulterior proceedings, is no evidence of the facts therein stated; as, for instance, where the House of Commons resolved that a plot against the government existed, the resolution was holden to be no evidence of the existence of such a plot. 4 St. Tr. 39.

**Proceedings in Courts of Equity.*] A bill in equity is proved by an examined copy. See 1 Arch. Pr. C. P. 132, 133. It is admissible in evidence no further than to shew that a bill did exist: it is no evidence, whatever of matters stated in it by way of surmise, in order to obtain a discovery; Bul. N. P. 235; nor even of those facts on which the prayer of relief is founded. 7 T. R. 2. and see Id. 3. n. See Gilb. Ev. 49, 50. Com. Dig. Evidence, C. 2. Bul. N. P. 235. 2 Sid. 221. Semb. cont.

An answer to a bill in equity is proved by an examined copy ; Gilb. Ev. 56. 1 Barn. & Ald. 182. 4 Id. 25. 3 Camp. 401. 1 Car. & P. 578 ; but before it can be admitted in evidence, the bill must be proved by an examined copy also. Gilb. Ev. 55. And where letters mentioned in a schedule to an answer were deposited in the court by order, it was holden that they could not be given in evidence, without first proving the bill and answer by examined copies. 5 Car. & P. 75. See 2 B. & Ald. 284. Ry. & M. 18. Where it was proved by the proper officer, however, that the bill had been searched for in the office, and could not be found, the court allowed the answer to be read without it. Gilb. Ev. 55. It is not necessary in the first instance to give any proof of identity, if that appear from the defendant's description in the bill or answer, or otherwise ; it will be presumed to be the answer of the person whose answer it purports to be, until the contrary be shewn on the other side. 1 Barn. & Ald. 182. 3 Camp. 401. But if the identity do not sufficiently appear from the bill or answer, it must be proved ; and this may be done by a witness acquainted with the defendant's handwriting, who has seen the original answer, and can swear to the defendant's signature to it, without producing the original in court. Ry. & M. 169, and see 2 Car. & P. 274. 271.

An answer is an admission of the party upon oath, and as such is evidence against him, see ante, p. 3. Godb. 326. Gilb. Ev. 50, whether the plaintiffs in the suit be parties to the action in which the answer is to be given in evidence or not. Peake, R. 268. And the answer of one partner, is evidence against his copartners, not indeed of the partnership, but (after that is established by other evidence) of any fact relating to the partnership property or concerns. Id. The answer of a guardian, however, is no evidence against the infant : Gilb. Ev. 50. R. 2 Vent. 72. 3 Mod. 259 ; nor the answer of a trustee, against his *cestui que trust* ; Bul. N. P. 237. 1 Keb. 281 ; nor the answer of a vendor against his vendee. 1 Salk. 286. 6 Mod. 44. Bul. N. P. 237. Yet in a late case, where the plaintiff claimed as owner of titho-hay in a certain close, the court held that the answer of a former owner of the close (from whom the present defendant had purchased it) to a bill filed by the vicar for tithes of the same close, and in which he set up the right of the ancestor of the present plaintiff, and the vicar thereupon abandoned the suit,—was good evidence against the defendant in this action. 16 East, 334. In order to make it evidence, however, in such cases, it must appear that he was owner at the time of putting in his answer : and therefore where a bill was filed against a person who was formerly owner of an advowson, twenty years after he had conveyed it to another, his *answer to it was holden not to be evidence against a person

claiming under his grantee, in a *Quare impedit* brought by a third party to recover the advowson. 5 Bing. 171. So, an answer is no evidence for the party who swore it, that is, he cannot produce it in evidence; unless in the case of an issue out of Chancery, when it is often expressly ordered to be received in evidence by the directions of the Lord Chancellor. When given in evidence against him, however, although done merely for the purpose of making depositions in the cause evidence, the whole of the answer is then in evidence in the action, as well such parts of it as make for him, as those which make against him. Bul. N. P. 237, 238, and see Gilb. Ev. 50. But this does not extend to matters in the answer which are stated merely as hearsay. 2 B. & P. 548. And where an answer in Chancery of the witness, was produced for the purpose of proving him to be incompetent, he having therein sworn that he had an annuity out of the land in question, the court held that it was not thereby made evidence in the action; it was produced merely to prove the incompetency of the witness, and not to prove the issue. Bul. N. P. 238. An answer to a bill in equity may also be given in evidence, to contradict what the same party afterwards swears as a witness at a trial at law; and it need not in such a case be produced, but may be proved by an examined copy. 4 B. & C. 25.

A Demurrer or Plea to a bill in equity, cannot be treated as an admission of the party of the facts stated in the bill, nor be given in evidence as such. Moody & M. 32.

Depositions in equity, are proved by examined copies. Gilb. Ev. 25. In order to render them evidence, however, you must first give in evidence an examined copy of the bill and answer, (unless the bill and answer have been lost, Gilb. Ev. 64. 5 Mod. 211. 2 Keb. 31. and see Hob. 112), and then prove that the deponent is dead, Gilb. Ev. 60. 1 Salk. 286. 1 Atk. 445, or abroad, out of the jurisdiction of the court, 1 Atk. 445. 1 M. & S. 4, or that he has been diligently sought for and cannot be found, Gilb. Ev. 60. or that he has been subpœnaed, but fell sick by the way, Gilb. Ev. 60, 1 Show. 363. 2 Str. 920, or the like; see 2 Ld. Raym. 1166. 1 Arch. Pr. C. P. 133; but that he has since become interested in the event of the action, is not sufficient. 1 Salk. 286. 1 Str. 101. See 2 Vern 700. 1 P. Wms. 288. Bunb. 205. Also, in order to render depositions evidence, the opposite party must have had an opportunity of cross-examining the deponent: and therefore depositions taken *de bene esse* before answer, cannot be read, T. Jon. 164. Gilb. Ev. 62, 64, even although the suit in equity were for the purpose of perpetuating testimony. T. Raym. 336. 1 M. & S. 4. See 1 Salk. 279. 1 Show. 363. But where the plaintiff in such a case, having obtained an order of the court for the examination of a witness,

gave notice thereof to the defendant, and of the interrogatories intended to be put; and on the same evening examined the witness, who left London for a foreign country and never returned; and the plaintiff afterwards obtained a further order that the deposition of the witness should be published, in order that it might be read in evidence at the trial; the court held that the deposition was admissible evidence at the trial; for the defendant had notice *of the time of examination, and might have cross-examined at that time or applied for further time for that purpose, had he wished it. 1 M. & S. 4. Also, if the bill have been dismissed, as being irregular, (as, for instance, where a bill of revivor was filed, instead of an original bill, Ch. Ca. 175,) depositions taken in the cause can never afterwards be given in evidence; Gilb. Ev. 63; but when dismissed for want of equity, or on the merits, they may. Id. 62. 2 Ld. Raym. 785. What is above mentioned, however, must be considered as applying only to cases where depositions in equity are to be used as proofs of the matter in an issue in an action at law; but they may be used for the purpose of contradicting the witness in the testimony which he gives in a court of law; and in that case it should seem that it would not be necessary to prove the bill and answer, but that an examined copy of the deposition would be sufficient. See Moody & M. 109.

Depositions are evidence only in actions between persons who were parties to the suit in equity, Gilb. Ev. 61, 35, or their privies. Thus, it was holden that depositions in a suit between A. and B., could not be given in evidence in another suit between A. and C., the latter of whom did not claim under either A. or B. 4 Camp. 401, case of the Berkeley Peerage. Hob. 112. 2 Rol. 679 l. 35. Hardr. 472. But in an action by a copyholder against his lord, for a false return to a *mandamus* relative to a custom in the manor, the court held that depositions in an ancient suit instituted against a former lord by another copyholder relative to a similar custom, and which depositions were made on behalf of the copyholder, were admissible evidence for the lord in the present action, as depositions of witnesses called on behalf of a person standing in *pari jure* with the present plaintiff. 4 M. & S. 486. So in trespass, the issue at the trial being, in which of two counties the *lucus in quo* was situate, an exemplification of the depositions in an ancient suit to perpetuate testimony, to which the plaintiff and defendant were privies, was holden to be admissible evidence, though it appeared that the interrogatories were leading interrogatories, and such as would not have been allowed to be put at the trial. 4 M. & S. 497. See Hardr. 22.

A decree in equity, if it remain in paper, may be proved by an

examined copy, together with an examined copy of the bill and answer; but if it had been enrolled, it must be proved by an exemplification under the great seal, which is evidence of itself without further proof. See 1 Arch. Pr. C. P. 133. 1 Crompt. & M. 393. A decree is evidence only in actions between persons who were parties to the suit in equity, or their privies. Bac. Abr. Evidence, F. As to what shall be deemed a decree, see 2 B. & Ad. 245; and as to what shall be deemed evidence of the decree under stat. 27 H. 8. as to tithes in London, see 2 Car. & P. 278.

Where a will remains in Chancery, by order of the court, it may be proved in a court of law by an examined copy. Gilb. Ev. 74. But where a letter was deposited in a court of equity by order, Abbott, C. J. refused to receive secondary evidence of it; because either party by applying to the court of equity, might have obtained permission to produce it. Ry. & M. 18.

**Proceedings in Courts of Law, not being Records.] Rules of court are proved by office copies; 1 Ld. Raym. 745. 1 Camp. 102. 471. n. Ante, p. 392; it is not necessary to have them examined. A rule of court is evidence that the court have ordered, as is therein stated; but it is not evidence of any matters in it which are the mere suggestions of the party who obtained it. 6 Taunt. 19: That an action has been discontinued, may be proved by the production of the office copy of the rule to discontinue, together with evidence that the costs have been taxed and paid. 1 Stark. 48.*

A judge's order may be proved by the production of the order itself; or by an office copy of the rule by which it has been made a rule of court. 4 Camp. 17. Where the order itself is produced, the judge's handwriting to the signature should be proved, if the trial be before a judge of another court.

A copy of a warrant of attorney, filed in pursuance of stat. 3 G. 4. c. 39, is good evidence against the party filing it, he being previously served with a notice to produce the original. 9 Bing. 746.

A special case, signed by the counsel on both sides, is deemed an admission by the respective parties of the facts therein stated, and may be given in evidence as such. Ry. & M. 4.

Affidavits, being admissions upon oath, are evidence as such against the parties who made them. Ante, p. 352. Gilb. Ev. 51. Affidavits filed with the clerk of the rules in the King's Bench, or with the secondaries in the Common Pleas, may, it should seem, be proved by the office copies; but if filed with any other officer, such as the filacer, the signer of the writs &c., they must be proved by examined copies, or produced. All other affidavits not filed can be proved only by

production of the affidavits themselves, and by parol evidence of their having been sworn; Gilb. Ev. 56; or if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their hand-writing. See Gilb. Ev. 56. 1 Arch. Pr. 134. An affidavit can be no evidence in favour of the person who made it. See ante, p. 362. Nor is the affidavit of a third person admissible in evidence; for the opposite party had no opportunity to cross-examine him; Gilb. Ev. 57. Style, 446. See Moody & M. 336; yet after his death, perhaps, it would be received to prove a custom, pedigree, or the like, where general reputation is evidence. See 1 Str. 35. In an action of covenant against two, the affidavit of one of them was holden good evidence against both. Gilb. Ev. 56.

In an action against the publisher, proprietor, or printer of a newspaper, a certified copy of the usual affidavit which is lodged at the stamp-office, (and which the proper officer there will give to any person upon application), shall, upon proof that the certificate was signed by the person who made the same, be deemed full proof of the swearing of such affidavit and of the contents thereof. 38 Geo. 3, c. 78. It must appear upon the *jurat* of the affidavit that the person before whom it was made had authority to take it; or this fact must be proved *abunde*. 3 Camp. 99. and see Id. 100.

The depositions of witnesses before a magistrate, in cases of felony or misdemeanor, are presumed to be taken down in writing; and therefore cannot be proved by parol, until it is first proved *that they were not in fact taken down in writing. 4 Car. & P. 273. See Id. 346, and see 7 Geo. 4. c. 64, s. 2 & 3.

When a witness has been examined upon interrogatories, the examinations and depositions, certified under the hand of the commissioners, master, prothonotary or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions; 1 W. 4. c. 22. s. 10. see that statute, and 1 Arch. Pr. C. P. [96—98.] and see 1 Camp. 101. 1 Car. & P. 506; evidence of course being first given that the witness is out of the country, 2 Salk. 691, or dead, or other evidence sufficient to satisfy the court that he could not be produced at the trial. See 1 Camp. 172. 1 Taunt. 461. Where he had actually sailed on his voyage, the depositions were allowed to be read, although the vessel in which he sailed was, at the time of the trial, driven back into port by contrary winds. 6 Esp. 92. If a witness examined on interrogatories, refer to a written document, which of itself is not evidence, as containing a true statement of the facts to which he is interrogated,

this writing may be read at the trial as part of his deposition. 1 Camp. 171.

When a writ in the nature of a *mandamus* or commission is sent out from this country to India, for the examination of witnesses there, upon interrogatories, in pursuance of stat. 13 Geo. 3, c. 63, s. 44; the examinations, when returned, shall be allowed and read, and shall be deemed good and competent evidence at the trial. See 1 Arch. Pr. C. P. [96.]

Proceedings in the Ecclesiastical Courts.] The libel, answer, depositions and sentence in ecclesiastical courts, in matters within their jurisdiction, are proveable in the same manner, and are evidence in the same cases and under the same circumstances, as the bill, answer, depositions, and decrees in courts of equity. See ante, p. 397—399. Gilb. Ev. 66, 67. Com. Dig. Evidence, C. 3, but see Bac, Abr. Evidence, F. Bul. N. P. 242. 2 Ro. Abr. 679. Lit. Rep. 167. Depositions in a cause relating to lands, however, cannot be read in evidence, because the spiritual court has no authority to entertain a suit upon such a subject. Gilb. Ev. 66. 2 Sid. 454. March, 120. Style, 1. Cro. Jac. 463. Nor is their sentence in any criminal proceeding as for fornication or the like, evidence in civil actions in courts of law. 2 Vez. 243. But their sentence in matrimonial causes, is in all cases evidence: and in all cases conclusive evidence of the facts they establish, except in suits of jactitation. Dutchess of Kingston's case, 11 Stat. Tr. and see 2 Str. 960, 961. Hardw. 11. 18. So their sentence in a cause for tithes, is evidence. 2 Mod. 231. R. 2 Rol. 679. l. 25. and see Com. Dig. Evidence. C. 1.

The practice of the ecclesiastical courts may, it seems, be proved by parol evidence in the courts of common law. 3 Camp. 388.

A copy of the probate of a will, under the seal of the ecclesiastical court, is sufficient evidence to prove a will of personal property, or that J. S. is executor, or the like; and the seal of the court sufficiently authenticates it without further proof. Gilb. Ev. 71. 1 Ro. Abr. 678. 4 T. R. 258. 3 Salk. 154. Bul. N. P. 246. See 1 *Arch. Pr. C. P. 134. And the will itself, as regards personal property, is not the best evidence in such a case. 8 B. & C. 335. But where, in an action against an executor, notice was given to him to produce the probate, and upon his non production of it, an officer from the ecclesiastical court produced the will itself, this was holden to be good as a kind of secondary evidence. 1 Brod. & B. 219. In an action by three persons, for an injury to leasehold property to which they were entitled as executors, a probate granted to one of them, was holden good evidence of the title of all. Moody & M. 362. The copy of the probate is conclusive evidence in the above

cases: that is, the other party shall not be permitted to allege that the will proved is not the last will and testament of the deceased. Gilb. Ev. 73. T. Raym. 404—406. 2 Sid. 359. But he may give in evidence that the probate is forged, or that it was obtained by surprise. Gilb. Ev. 73, 74. T. Raym. 2 Sid. *ubi supra*. The probate, however, is no evidence to prove a devise of lands. 1 Ro. Abr. 673. Gilb. Ev. 71. So, in ejectment, to prove the relation of father and son by the father's will, the will must be produced; the probate is no evidence. Gilb. Ev. 72. But the ledger book is evidence in such a case; Id. 72; a copy of the ledger book not. Id. 73.

Administration is proved by a certificate from the ecclesiastical court that administration was granted; Bul. N. P. 246; or you may get a clerk from the ecclesiastical court to attend at the trial with the book of Acts, containing the direction for letters of administration to be granted and the surrogate's *fiat* for the same. Id. 8 East, 187. Or, in an action against an administrator, his being administrator may be proved by an examined copy of the Book of Acts, 13 East, 232, or by the production of the book itself. In either of these cases, however, the opposite party may shew that the letters of administration have been revoked; 2 Sid. 359; but it is not sufficient to shew that subsequent letters of administration have been granted to another, without shewing that the first have been recalled. 8 East, 187.

Proceedings in the Court of Admiralty.] The libel, answer, depositions and sentence in the admiralty court, are proved in the same manner as the bill, answer depositions and decree of a court of equity, by examined copies. See Com. Dig. Evidence, C. 1. 1 Arch. Pr. C. P. 135. The sentence is conclusive evidence of the facts it establishes, not only against those concerned in interest, and persons claiming under them, but also against strangers. Thus, a sentence condemning goods as captured from the enemy, is conclusive evidence that they were so captured. 2 Camp. 228. As to the proceedings in foreign courts of admiralty, see post, p. 407.

Proceedings in inferior courts, not of record.] Judgments in a court baron, county court, or other inferior court, may be proved, by producing the books in which they were entered, or, it should seem by examined copies. See Gilb. Ev. 74. 20. Com. Dig. Evidence, C. 1.

The court-rolls of a manor, may be proved by examined copies, Gilb. Ev. 75. 4 B. & Ad. 617. Comb. 337. 12 Mod. 24, or it *seems by a copy under the steward's hand, Comb. 138. 1 Keb. 576. 720, or you may get the steward or his deputy to produce them at the trial. 16 East, 208. 1 Arch. Pr. C. P. 135. See Gilb. Ev. 75. And where a surrender of copyholds to the steward out of court, in May 1790, was

afterwards in December 1792, presented in court by the homage, but no entry of it was made upon the Rolls: it was holden that the surrender and presentment might be proved by a draft of an entry of them produced from among the muniments of the manor, and the parol testimony of the foreman of the homage who made the presentment. 6 B. & C. 484. Court-rolls are evidence of the matters therein stated. But in the case of a surrender to the use of a will, and admission of the devisee, the court-rolls are no evidence of the devisee's title; that must be proved by the production of the will itself. Gilb. Ev. 77. An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, has been holden to be admissible evidence in the mode of descent, although no instances of any person having taken according to it, be proved. 5 T. R. 26. So, court-rolls containing old licences by lords of the manor, in consideration of certain rents, to fish in a certain place, were deemed admissible evidence of a prescriptive right of fishery in that place as appurtenant to the manor, without proof of the rents having been paid, it appearing that the like rents were paid in modern times. 1 Camp. 309. But a presentment or finding by the homage in a matter of which they have no cognizance, cannot be given in evidence, 10 B. & C. 657. As to the right of inspecting court-rolls, see 1 Arch. Pr. C. P. 135.

A record in the record book of a manor, of an admittance to a copyhold, reciting a surrender of the same copyhold to the use of a will, is, admissible evidence of a surrender, the steward not being able to find the surrender itself upon the rolls or elsewhere, although all the other surrenders were either preserved or recorded on the roll. *R. v. Thruscross*, 1 Ad. & E. 26.

A condemnation by the commissioners of excise, is evidence, although not conclusive, of the propriety of the seizure. 2 W. Bl. 1174. See Carth. 346.

An award is proved by the attesting witness, if it be attested, or by proving the arbitrator's hand-writing, if the award be not attested, as in other cases of written instruments. The submission must also be proved: if by deed, the execution of it by all the parties must be proved, even although one of them only be interested in such part of the award as is material to be proved in the action; 15 East, 209. 7 B. & C. 427. 8 Id. 124; if under a judges order, either the order must be produced, or an office copy of the rule by which it was made a rule of court. 4 Camp. 17. Where the award is by an umpire appointed by the arbitrators, his appointment must also be proved; and a recital in the award that the arbitrators had appointed him, or evidence that he acted with the arbitrators, will not be sufficient for

that purpose. *Id.* In an ejectment brought against a mortgagor then in possession, the cause was referred to arbitration, and decided in favour of the lessor of the plaintiff, who thereupon obtained possession; and afterwards in an ejectment brought against him by the mortgagee, it was holden that the award was no evidence for him, being *res inter alios acta.* 1 Ad. & E. 119.

As to proceedings in bankruptcy: By stat. 6 Geo. 4. c. 16. s. 95, all things done pursuant to stat. 5 Geo. c. 30, s. 44, whereby it was enacted that the Lord Chancellor should appoint a place *where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof is confirmed; and it is enacted that the Lord Chancellor shall be at liberty from time to time to appoint a proper person, who shall, by himself or his deputy enter of record all matters relating to commissions, and have the custody of the entries thereof. And by sect. 96, in all commissions to be issued after this Act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received in evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid; and which shall be so entered, and a certificate of such entry indorsed thereon, upon application by or on the behalf of any party interested therein, without petition in writing presented for that purpose, upon payment of certain fees in the Act mentioned; and upon the production of such instrument afterwards in evidence, the certificate so indorsed upon it shall, without any proof of the signature thereto, be received as evidence of such instrument having been so entered of record. Also, by the same section, the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matters relating to commissions of bankrupt, to be entered of record as aforesaid.

These regulations being somewhat inapplicable to the fiats and other proceedings under the Act for establishing the court of bankruptcy, it was thought necessary, by stat. 2 & 3 W. 4. c. 114. (after making regulations for the removal of the then existing records to the enrolment office of the bankruptcy court, and for the enrolment of the proceedings under old commissions there) to enact, that all fiats in bankruptcy, all adjudications under such fiats, and all appointments of assignees and certificates of conformity, must be entered of record in such court of bankruptcy, sect. 5, 6, otherwise they should not be received in evidence. Sect. 8. The Act also provides, that upon application to any of the judges of the court of bankruptcy, he may direct any deposition or other proceeding under such fiat to be entered of record as aforesaid.

Sect. 5. And upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said court of bankruptcy, or of any writing purporting to be a copy of any document and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof. Sect. 9.

As to depositions in bankruptcy, although they might have been entered of record as above mentioned, by order, formerly of the Lord Chancellor, and now of any of the judges of the court of review, there was no provision by which they were made evidence, in case of the death of the deponents, until by stat. 2 & 3 W. 4, c. 114, s. 7, it was enacted, that in the event of the death of any witnesses deposing to the petitioning creditor's debt, *trading, or act of bankruptcy, under any commission or fiat already issued or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their authority, in cases hereafter mentioned, to produce and read in evidence in all courts of civil judicature, and in all civil proceedings, in maintenance and support of such commission and fiat, any deposition of such deceased witness relative to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited Acts, (6 G. 4. c. 16. and 1 & 2 W. 4. c. 56.) or of this Act: and the production or reading of such depositions or of any copy thereof, duly authenticated according to the provisions of the said recited Acts or of this Act, shall have the same effect as if the matters alleged therein had been deposed to by the same witness in such court, according to the ordinary practice thereof: Provided always, that the before-mentioned depositions shall be read in evidence, in such cases only where the party using the same shall claim, maintain, or defend some right, title, interest, claim or demand, which the bankrupt might have claimed, maintained or defended in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceedings now pending, by which the validity of any commission of fiat is or may be brought into question.

Depositions taken before commissioners of bankrupt, and enrolled by the assignees according to 6 G. 4, c. 16, s. 96, are not evidence against them in an action brought to dispute the commission, as dispreoving the act of bankruptcy on which it is founded. *Chambers v. Bernasconi*, 4 Tyr. 531.

As to proceedings in the Insolvent Court: By stat. 7 Geo. 4. c. 57. s.

76, after providing that the insolvent or any of his creditors, or their respective attornies, shall upon application have inspection of the insolvent's petition, schedule, order of adjudication, and all other orders and proceedings in the matter of the petition, and that copies thereof shall be given to them, if required, it is enacted "that a copy of such petition, schedule, order, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order or other proceeding, and sealed with the seal of the said court, shall at all times be admitted in all courts whatever, and before commissioners of bankrupt and justices of the peace, as sufficient evidence of the same without any proof whatever given of the same, further than that the same is sealed with the seal of the said court, as aforesaid." See 3 Car. & P. 625. When, in ejectment by the assignee of an insolvent debtor, the assignment was given in evidence, but no other evidence given of the insolvent's discharge, but merely that according to the practice of the insolvent court an assignment is never executed to the assignee until after the insolvent has been discharged; and it was objected that the proceedings in the insolvent court and the insolvent's discharge should also be proved, as by a provision in the insolvent act the assignment would be void if the insolvent was not discharged; but it was holden that sufficient *prima facie* evidence was given; it was for the defendant to prove that the insolvent had not been discharged, if such were the fact. 3 D. & R. 509, and see 5 M. & R. 72. Where, in an action for goods sold and delivered in 1823, the defendant pleaded his bankruptcy, and the plaintiff, on the other hand, after proving that under the bankruptcy the defendant had not paid 15s. in the pound, gave in evidence an order of the insolvent court in 1815, directed to the keeper of Lancaster Castle, reciting that the defendant had been adjudged entitled to the benefit of the Act, and ordering him to be discharged, and he was discharged accordingly: it was objected that this was not sufficient, but the proceedings and judgment of the insolvent court ought also to be proved; but the court held that the evidence given was sufficient, as it proved all that was required to be proved in such a case by the bankrupt act, namely, the previous discharge of the defendant under the insolvent act. 4 B. & C. 335. 6 D. & R. 464. Where, in order to prove a rule of the insolvent court, a printed copy of the rules of that court, printed by order of the court, for distribution among the officers and suitors of the court, was given in evidence, Lord Tenterden, C. J. held it to be sufficient, although it appeared that the original rules were under the seal of the court and kept at the court,

and there was no evidence that the copy given in evidence had been examined with them. *Moody & M.* 294.

Proceedings in Foreign Courts.] The judgments &c. of a foreign court, are proved by exemplifications under the seal of the court, or by examined copies; Per *Ld. Ellenborough, C. J.* 6 *M. & S.* 34. and see 4 *M. & S.* 520; usually the former; but where a copy of a judgment of a court in Jamaica, not proved to have been examined, but merely purporting to be signed by the clerk of the court, and certified by him to be a true copy, was tendered in evidence, accompanied with a certificate of a notary of his being clerk of the court, and another certificate of the governor of the colony, that the person so certifying was a notary public, it was holden not to be receivable in evidence. 6 *M. & S.* 34. 39. 2 *Stark.* 6, and see 3 *Camp.* 215. n. If proved by an exemplification, it must be proved that the seal affixed to the exemplification is the seal of the court; it is not sufficient to prove merely the judge's hand-writing subscribed to it. 3 *East*, 221. If indeed it be satisfactorily proved that the court has no seal, then an exemplification, signed by the chief judge of the court, would perhaps be received, upon proof of the hand-writing. 4 *Camp.* 28. But it is not sufficient, for the purpose of letting in such evidence, to prove that the court has a seal, but that it is so much worn as no longer to make any impression. 1 *Stark.* 525. It may be necessary to state, that the rule above laid down for the proof of foreign judgments &c., relates equally to the judgments of courts in the British colonies, as to those of courts in countries unconnected with this kingdom. Records of the courts in Ireland may be proved by examined copies, in the same manner as the records in this country. It is necessary however, that the court should be satisfied that it was with a record the copy was examined; and therefore, where the witness produced to prove the copy, stated that he examined it with a parchment roll shewn to him in a room over the Four Courts at Dublin without seeing from whence it was taken, or knowing the *person who produced it to be an officer of the court, Lord *Ellenborough* refused to receive it in evidence. 4 *Camp.* 372. 1 *Stark.* 183.

The judgments and decrees in those courts are in general received in the courts in this country as conclusive evidence of the facts they establish; and the party against whom they are produced, is not at liberty to shew that the proceedings are erroneous. 4 *M. & S.* 20. See 1 *B. & Ad.* 459. 2 *Id.* 951. Our courts however have refused to give effect to a foreign judgment, where some of the proceedings appeared to be contrary to the first principles of public justice. Thus, it has been holden that no action could be maintained in this country, on a judgment obtained by default in one of the colonies, against a party who

on the face of the proceedings, appeared to have been summoned merely by nailing up a copy of the declaration on the door of the court house ; and it did not appear that he had ever been present in the colony, or subject to the jurisdiction of the colonial court. By a law of the colony, indeed, such a mode of summoning was to be deemed good service, if the defendant were *absent* from the island ; but such absence must be intended of one who once was present and submitted to the jurisdiction. 9 East, 192. 1 Camp. 63. But where a suit was commenced in the Mauritius against a person, who was then absent from it, but who had been resident there at the time the cause of action accrued and in such a case, by the laws of the colony, process against him in the suit was to be served on the king's attorney-general, and which was done accordingly : the Court of King's Bench here held that an action could be maintained in this country on a judgment obtained by the plaintiff in such suit. 2 B. & Ad. 951.

The sentence of a foreign court of admiralty, is conclusive evidence, in the courts in this country, of the facts alleged in the adjudicative part of it, 1 Camp. 418, and in the reason therein stated as the grounds of the judgment ; 8 T. R. 192 ; but not of any of the premises (stated in the consideratory part of the sentence) that led to the adjudication. 8 T. R. 192, nor of any thing which may be gathered from it by way of inference. 1 Camp. 418. 7 Bing. 495. Thus, in an action against underwriters on a policy on goods warranted *Danish* property, a sentence of condemnation in a French court of admiralty, stating as the ground of it that the property was *British*, was holden conclusive evidence against the plaintiff, although in fact the property were Danish. 2 East, 473. So, in all cases where the property insured has been warranted neutral, sentences in foreign courts of admiralty condemning the property for reasons inconsistent with neutrality, 8 T. R. 230, as, for instance, for infraction of treaty, in the ship's not being properly documented &c., 5 East, 99. 14 East, 374. 7 T. R. 681, or on the ground of her not being neutral built, 5 East, 155, or the like, is conclusive evidence against the plaintiff in an action on the policy : and no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion from them was unfounded. 5 East. 155. And this, although the enemy's court which made the adjudication was sitting at the time, not in the country of the enemy, but in that of one of his allies who was *also at war with this country. 2 East. 473. But the sentence of a court of admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognized in our courts ; and that country is to be considered neutral for this purpose in which the forms of a neutral independent government are preserved,

although the belligerent may have such a body of troops there, as in reality to possess the sovereign authority. 1 Camp. 429.

Before the sentence of a foreign court of admiralty, condemning a ship as prize, can be given in evidence, a foundation for it should be laid by proving the capture. 2 Camp. 69.

As to the proof of the laws of a foreign country: if not written, they may be proved by the parol examination of witnesses of competent skill; if written, a copy properly authenticated must be produced. 3 Camp. 166. 4 Camp. 155, per Gibbs, C. J. 3 Stark. 178. Where an instrument under the seal of the Synagogue at Leghorn, and which purported to be a divorce of a Jew and Jewess there, was tendered in evidence, Lord Kenyon, C. J. refused to receive it, until the law of the country upon the subject was first proved. Peake, N. P. C. 25, and see Ry. & M. 102.

The acts of state of a foreign government must be proved by copies examined with the public archives abroad; a copy printed and published abroad by the authorized printer of the foreign government will not it seems, be sufficient. 1 Camp. 65. n.

Surveys, inquisitions, &c.] Inquisitions taken by virtue of the king's writ, or of a commission under the seal of the Exchequer &c., are admissible evidence, but not conclusive; 1 Bur. 146; so are the depositions taken thereon, evidence, in the same manner as depositions in equity, (see ante, p. 396), even although the parties interested had no notice of the inquisition, or opportunity of cross-examining the witnesses. 1 Bur. 146. Thus, a commission of inquiry under the Exchequer seal, and an inquisition taken thereon, were holden admissible evidence of certain lands having been part of a priory, though the party to the suit was no party to the commission. 1 Bur. 146. And an ancient extent of crown lands, found in the Lord Treasurer's Remembrancer's offices, purporting to be taken in the reign of Edward 3, by a steward of the king's lands, and apparently taken in pursuance of the stat. 4 Edward I, which required such extents to be taken, was received in evidence by the Court of King's Bench in a trial at bar, although the commission under which it was taken could not be found. 8 B. & C. 747, 737. So, an inquisition taken under a commission of lunacy, has been holden to be admissible, though not conclusive evidence, to prove a man a lunatic at the time of his executing a deed. 3 Camp. 126. An inquisition by a coroner *super visum corporis* finding a person *felo de se*, would probably in the same manner be deemed admissible, though not conclusive, evidence of the facts established by it. See 2 Hale, H. 416. 3 Inst. 54: But an inquisition made by a sheriff's jury, to ascertain to whom the property of goods taken under

a *fi. fa.* belonged, has been holden not to be admissible evidence in an action of trover for the goods, brought by the person who was found by *the inquisition to be the owner. 2 H. Bl. 237; nor is it admissible evidence for the sheriff, in an action against him for a false return, 3 M. & S. 175, although probably it might be deemed admissible, in mitigation of damages, in an action of trespass against him for taking the goods of a stranger. See *Id.* and see 1 Arch. Pr. C. P. 256. And where a presentment in a court baron was tendered in evidence, in which the jurors, after reciting that they were sworn to view such part of the waste land of the manor, and was claimed by A. B. to belong to his tenement called Tyr Adam, upon their oaths said, that they had considered the claim and the evidence, and presented that the said land was parcel of the common called K. and that neither the said A. B. nor the tenants or occupiers of the tenement called Tyr Adam had any right to the same, nor any further or greater right than such as the other freehold tenants of the manor had for their commonable cattle: this was holden not to be receivable in evidence; not as a presentment, because the homage had no right to decide the claim of an individual to the freehold, they being themselves interested: not as an award, because there was no mutual submission; and not as evidence of reputation, because it was a declaration of the homage *post litem motam*. 10 B. & C. 657.

Inquisitions are proved by the production of the writ or commission and inquisition, or by an examined copy thereof, if they have been returned and filed; and indeed it may be questionable whether they can be evidence at all, until returned and filed.

Domesday book, which is a survey of the king's lands, made in the time of William the Conqueror, is evidence of lands being ancient demesne. Gilb. Ev. 76. If they be not found there under the title *De terra Regis*, they are not ancient demesne. 1 Salk. 57. See ante, p. 277. If the issue be, whether the lands are ancient demesne or not, the book itself must be produced: for the trial in that case is not by a jury, but the matter is determined by the court upon inspection of Domesday book. See Hob. 188. Tr. per Pais, 342. If the question however come incidentally before the court, it may be proved by an examined copy of that part of the book relating to it; for Domesday book is, strictly speaking, deemed a record.

That a certain place is situate within one of the ports of the kingdom may be proved by an ancient survey of the king's ports, to be found in the Exchequer, which ascertains their extent. Gilb. Ev. 77. So other ancient public surveys, are admissible in evidence.

*The original visitation books kept at the Herald's office, compiled

when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigree. Comb. 63. 3 Bl. Com. 105. Even the minute book of a visitation, signed by the heads of the several families, and found in a private library, has been deemed admissible evidence for that purpose. 1 Str. 102.

Registers, &c.] Christenings, marriages and burials, may be *proved by the parish register in which they are entered, by giving in evidence either the register itself or an examined copy of it. Gilb. Ev. 72. 2 Bac. Abr. Ev. F. Although the register be made up from a day-book, yet the register itself shall be deemed the original, and the day-book shall not be received to contradict it: 2 Str. 1073. Besides the register, some proof must be given of identity of the parties married, &c. 1 Doug. 170. But this proof by the register is not to be deemed the only evidence of a marriage; for even in a prosecution for bigamy, it was holden by the judges that proof of the marriage by persons who were present at it, and saw the ceremony performed, was sufficient, without proof of the registration of the marriage, or of any licence or publication of banns. *R. v. Allison, alias Wilkinson*, Russ. & R. Cr. Ca. 109. 2 Arch. Peel's Acts, 163. And it is only in this case of bigamy, and in the action for criminal conversation, that an actual marriage (that is, a marriage proved by the register, as above mentioned, or by parol evidence of some person who was present) is required; Bul. N. P. 27. 4 Burr. 2057; in all other cases, general reputation, or an acknowledgment of the parties, added to cohabitation, will be sufficient evidence. It may be necessary to remark, also, that although a baptismal register is evidence of the time and place of baptism, it is no evidence whatever of the time of birth, 4 Car. & P. 29, nor of the place of birth, 5 B. & C. 508, unless perhaps where it is proved that the child at the time was very young, in which case it might possibly be presumed to have been born in the parish in which it was baptized. Id. And in all cases it must appear that the entry in the register was made by the person whose official duty it was to make it, or at least by some person authorized by him to do so; and therefore where it appeared in evidence that an entry of a baptism was made, not by the clergyman who was then rector, &c. of the parish, but after his death by the clergyman who succeeded him in the living, from notes made by the parish clerk at the time: the court held that it was not admissible in evidence. 8 B. & C. 813. Also entries in the registers of dissenting chapels, are not receivable in evidence. 4 Car. & P. 375.

The Fleet books are not evidence of a marriage. Peake, 231. The

marriage of Jews is by a written contract, which is afterwards solemnly ratified in the Synagogue. In order to prove such a marriage, it is not sufficient it seems to prove the religious ceremony, by the parol testimony of some person who was present, but the contract also must be proved. 1 Camp. 61.

An entry in a bishop's register of visitations, has been holden to be evidence of the facts stated in it. 5 Bing. 316. So an entry in a book kept in the chapter-house of a Dean and Chapter, purporting to contain copies of the leases granted or confirmed by them, was held by Tindal, C. J. to be evidence, as a public document, to prove a collateral fact, namely, that a particular place was within a certain parish. Moody & M. 398.

As to ship's registers: a certificate of registry, by itself, is no evidence that the persons named in it are owners. 3 Camp. 456. 14 East, 226. 2 Taunt. 5, see 2 Camp. 339. 4 Camp. 24. 16 East, *169, see 1 Car. & P. 602. semb. cont. or that the ship is British built. 3 Camp. 475. But the certificate and affidavit of registry are sufficient evidence to prove ownership in those who made the affidavit; 4 Taunt. 802; indeed the affidavit of itself is sufficient for that purpose. See ante, p. 352. So the certificate of registry, together with evidence of possession or acts of ownership by the persons therein named, or that the entry was made by their authority, will be sufficient. 4 Taunt. 652. 2 Id. 5. The certificate of registry however is of itself evidence that a person not therein named is not owner; 5 T. R. 709; because to complete his title, it is essential that the ship should be registered in his name. What is above said as to the certificate and affidavit of registry being evidence, must be understood of cases where they are produced as evidence against the owners; for they are no evidence whatever for them, 3 Camp. 240. 4 Taunt. 652, unless accompanied by evidence of their possession of the ship, by themselves or their agents. Id. And even such possession alone, without proof of registry, will be sufficient in an action against a wrong-doer. 2 Taunt. 302. So, possession, acts of ownership &c. are sufficient evidence of ownership *prima facie*, in actions by the owners upon policies of insurance or the like, until proof by the registry be rendered necessary, by some proof to the contrary being given by the opposite party. 4 East, 130. 5 Esp. 88. The affidavit, entry in the register &c., above mentioned, when requisite, may be proved by examined copies, by stat. 6 Geo. 4. c. 110. s. 43, which also requires the collector and comptroller of the customs of the port to produce them to any persons wishing to inspect them.

The register of the navy, with the letters Dd. opposite to a name therein registered, (it being proved to be the practice at the Navy Of-

fice to write those letters opposite to the names of such persons as died,) was holden admissible evidence of the death of a man, opposite to whose name those letters were written. *Bul. N. P.* 249. The log-book of a man of war has also been admitted as evidence, to prove the time of sailing of a certain ship under the convoy of such man of war; 1 *Esp.* 427. 4 *Camp.* 275; and even the official letter of the captain of a ship of war to the Secretary of the Admiralty, at the end of the voyage, has been received, without objection, for the same purpose. 4 *Camp.* 275.

The prison books of the Fleet and King's Bench prisons, are admissible evidence to prove the time at which a prisoner was committed or discharged; but they are not admissible to prove the cause of the commitment. 3 *B. & P.* 188.

But the books kept at the offices of under-sheriffs, in which the writs which are left for execution are entered, are not deemed public books of which the courts will take judicial notice; and therefore entries in them are not evidence. 6 *Bing.* 442.

The poll books of an election are also admissible evidence, and may be proved by an examined copy. *Willes*, 424. 1 *Str.* 307. So an entry in a family bible, an examined copy of an inscription on a tombstone, a pedigree hung up in a family mansion, and the like, are admissible evidence in questions of pedigree. *Cowp.* 594. And where the question was whether an entry by the father *in the family bible, stating that A. was his eldest son and heir, born in lawful wedlock, was admissible evidence in proof of A.'s legitimacy, all the judges were clearly and unanimously of opinion that it was, and that the like entry in any other book or paper would have the same effect. 4 *Camp.* 401, *Berkeley Peerage case*. It was also made a question, whether, if such entry were made by the father, with the express view of proving the legitimacy of his son, (should it be brought in question after the father's death,) it would still be admissible; and the judges held that it would, although undoubtedly that circumstances would have a material effect as to the credit to be attached to such evidence. *Id.* An entry by a father in an almanack, of the day of the birth of his son, was holden to be good evidence of his son's age. *T. Raym.* 84.

Certificates, &c.] Lord Abigney having promised, in the presence of the king, to settle certain lands upon his daughter on her marriage; in a suit upon this promise, the king's certificate, under his sign manual, of the purport of the promise, was holden sufficient evidence of it. *Hob.* 213. *Godb.* 199. but see *Ro. Abr.* 686. The authority of the above case, however, may very reasonably be doubted.

The certificates of bishops with respect to marriage, general bastardy,

excommunication, orders, and other the like matters, are received in evidence; Co. Lit. 74. 6 T. R. 637. See 2 H. Bl. 156; so were formerly certificates from the captain of Calais, 9 Co. 31. 6 T. R. 637, the certificate of the mareschal of the king's host, &c., the certificates of the judges in Wales respecting the practice of their courts, 6 T. R. 638; and so are at present the certificates of justices of the peace as to a highway being in repair. 6 T. R. 619. See 1 Str. 481, 568. And where the certificate of the bishop, for instance, is given in evidence, it may be impeached by the opposite party, by proving that the person certifying was not bishop at the time. Dy. 234. Where, upon a question as to the validity of a marriage in Ireland, it became material to prove that one Wood who performed the ceremony, was a clergyman of the established church; for which purpose, a document, purporting to be a certificate of ordination or letter of orders, and to be signed and sealed by a late Archbishop of Tuam, found amongst Wood's papers at his decease, and produced at the trial by his widow, was holden to be good evidence; and that as the seal was not that of any court, it need not be proved, nor was it necessary otherwise to prove the document, as it was more than thirty years old. 2 B. & Ad. 639.

If a custom of the city of London be alleged in pleading, it must be proved by the certificate of the recorder *ore tenus* at the bar, if the party surmise that it should be so tried; but if there be no such surmise, then it is tried as in ordinary cases by a jury. 1 Bur. 248, 251. When it is to be tried thus by certificate, a *certiorari* issues directed to the lord mayor and alderman of London, requiring them to certify the custom, and a written return is made to it; and upon a motion being made in court that the recorder should return the *certiorari*, the recorder appears at the bar, and having read the statement of the custom in the pleading, certifies *ore tenus*, in the name of the mayor and aldermen, that there is or is not such a custom, and at the same time delivers in the writ and written return. Id. But where the custom is one in which the corporation itself is interested, as the right of taking toll &c. this trial by certificate is not allowed. Hob. 85. Where the ancient book, called "*Privilegia Londini*," was given in evidence, to prove a custom of London, Lord Tenterden, C. J. allowed a copy to be produced and a passage read from it relating to the custom, but avoided giving any opinion as to its being evidence. Moody & M. 350.

But the certificate of a British consul abroad, is not admissible as evidence in the courts of common law in this country. See 1 D. & R. 324. Thus the certificate of a British vice-consul at the Brazils, as to the amount of the proceeds of certain damaged goods, which by the law of that country must be sold under his inspection, was holden not

to be evidence. 3 Taunt. 162. Yet instruments of this description are daily sent to this country from abroad, under the mistaken idea that our courts receive them in evidence. So, the certificate of an agent of Lloyd's abroad, as to the amount of damage a cargo had sustained, was holden not to be evidence in an action on a policy of insurance, although both the plaintiff and defendant were members of Lloyd's. 1 B. & C. 437.

A notareal protest is evidence of the non-acceptance or non-payment of a bill of exchange drawn upon a person abroad; see 5 T. R. 230. 7 East, 350; but it is no evidence in the case of a bill of exchange drawn upon a person in this country. 4 Camp. 129, or in any other instance. See 1 D. & R. 324.

The mere production of a *diploma* of doctor of physic, purporting to be under the seal of one of the universities, is not in itself evidence to shew that the party therein named is entitled to that degree, without proof that the seal is that of the university. 8 T. R. 303. And Best, C. J. refused to receive in evidence a certificate from the Veterinary College, signed by one of the professors, stating that the plaintiff had attended lectures there. 1 Car. & P. 392. But the certificate of the Apothecarie's Company, that a person is qualified to practice as an apothecary, is made evidence by stat. 6 Geo. 4, c. 133. s. 7, and is proved either by proving the seal to it to be the seal of that company, Ry. & M. 306, or by proving the handwriting of one of the examiners to it, and that such person acts as examiner. 1 Car. & P. 309, 495.

To prove that a party had received the degree of Doctor of Medicine in the University of St. Andrew's, a sealed instrument and a written paper were produced: the sealed instrument purported to be a diploma of the degree conferred by the University, and it was proved that a person at St. Andrew's, calling himself the University Librarian, in a room which he stated to be the University Library, had shewn a seal corresponding with the seal to the instrument produced, as the University seal. The written paper was, on the face of it, an act of the University conferring the degree, and it was proved that in the same room, the same person, and others calling themselves professors of the University, had shown a book, as the book of acts of the University, which contained an entry agreeing with his written paper. Held, that this was sufficient evidence. *Collins v. Carnegie*, 1 Ad. & E. 695.

Ancient Terriers, &c.] An ancient terrier or survey of a manor &c. whether ecclesiastical or temporal, may be given in evidence; for there may be no other way of ascertaining tenures or boundaries. *Gubb. Ev.* 77. Where it appeared that whilst two manors were in the

possession of the same person, he caused a survey to be made of one of them; afterwards, when these manors came into the possession of several lords, disputes arising as to the boundaries, this survey was holden to be evidence; 1 L. Raym. 734: but it would be otherwise, if both manors were not in the hands of the same person, at the time the survey was made, Id. for a survey is not in general evidence against a stranger. 1 Str. 95. A *customary of a manor, which appeared to be of great antiquity, and delivered down with the court rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor: 1 T. R. 466. So, parchment writings, preserved among the muniments of a manor, and dated 1698 and 1717, purporting to be signed by several copyholders of the manor, stating an unlimited right of common in the commons, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner,—were admitted by the court as evidence of reputation as to the general right of common. 13 East, 10. So, in proof of a prescriptive right to a several fishery as belonging to a manor, old licences which appeared on the court rolls of the manor and bore date from 1661 to the end of the 17th century, whereby the lords of the manor had for certain rents granted a right of fishery and dredging for oysters in it, reserving to themselves the right to all floating fish therein, was holden by Heath, J. to be receivable in evidence, without proof of the payment of any rent under them; but he held that, to give them much weight, payment of rent under similar licences in modern times, or other acts of ownership by the lords of the manor, and acquiesced in, must be proved. 1 Camp. 309. So, where the question was whether certain land was in the parish of A. or B. the plaintiff, who had to prove that it was in the parish of A. which was tithe free, gave in evidence old leases of the lands granted by the ancestors of his landlord, coming from his custody, which described the land as being in the parish of A; these being objected to, on the ground that as the parish of A. appeared to be tithe free, the owners and tenants of the land in question were interested in representing it as in A.; the court held that, as this was a question of boundary, in which evidence of reputation must be received, the leases were therefore properly receivable in evidence. 10 B. & C. 17. In the same case also, the plaintiff gave in evidence ancient poor rates, by which the tenants of the land were rated to the poor in A.; and to prove that they paid the rates, he produced three ancient accounts of the overseers of A., in which there were crosses against the sums for which those tenants had been assessed: the court held, that if it were necessary to prove actual payment of the rates, the crosses thus made against the

sums assessed, being a very common mode of denoting payment, was evidence of it. *Id.* and see 5 T. R. 412, n. But Abbott, C. J. refused to receive in evidence the entries in an ancient book, produced from a parish chest purporting to be made by a church-warden, stating particular facts, but by which he did not charge himself. 2 Car. & P. 479. An old deed between a public body claiming tolls and another public body liable to pay the tolls, regulating the amount of toll to be taken, was holden to be evidence in the nature of reputation as to the right and the exercise of it, although there was no evidence of the deed having been afterwards acted upon; *Moody & M.* 416; but an award between the same parties, from which that deed now mentioned originated, but not otherwise acted upon, was holden for that reason not to be evidence. *Id.* So, in the same case, it was decided that *an ancient table of tolls produced from the muniments of the plaintiffs (who were a corporation), and copies of which were proved to have been given by them to their lessee, and by their lessee, to his collectors, and according to which the tolls had been collected, was receivable in evidence for the plaintiffs; although without such additional evidence as to the copies &c., it would not have been evidence. *Id.* 419. And the counterpart of an old feoffment, found amongst the papers, not of the feoffee, but of the feoffor, was holden not to be evidence to prove any right in the feoffor. 6 Car. & P. 441, 437. Even an old map of lands has been admitted as evidence, where it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. *Gilb. Ev.* 77. But where a copper-plate map, purporting to have been taken by direction of the parish officers, and in which a close in question was represented as a public highway was tendered in evidence in proof of that fact, Lord Kenyon, C. J. rejected it, although it was generally received in the parish as an authentic map. *Peske R.* 27. A survey of religious houses, (deposited in the First Fruit's Office) taken in 1563, upon the dissolution of the monasteries, was allowed to be good evidence to prove a vicar's right to small tithes, although the commission was lost under which it was made. 1 Wils. 170. A terrier of glebe is strong evidence against the parson. See 6 Bing. 226, *infra*. But it is no evidence for him, unless signed by the churchwardens (not being of his nomination), as well as the parson: and even then it seems to deserve very little credit, unless it have been signed also by the substantial inhabitants. *Bul. N. P.* 248. See 15 East, 641. 3 Camp. 288. In all these cases of terriers and surveys, before they are admitted in evidence, some satisfactory account should be given as to the custody in which they have been, so as to raise a presumption that they are genuine in-

struments. See 3 Taunt. 91. The regular place of deposit for a terrier, is the bishop's registry. But where an ancient statement of the tithes payable in a parish, signed by the then rector and by others, was produced in evidence against the present rector from among the title-deeds of an extensive landowner in the parish, and it was objected to as not coming from the bishop's registry: the court admitted that if this were a terrier, the objection would be a valid one; but they said that this was but a mere statement, signed by a rector, which as an admission would have been good evidence against him, and consequently was admissible evidence against his successor. 6 Bing. 226.

Corporation Books. &c.] Entries in corporation books, and in the books of public companies, relating to things public and general, and entries in other public books, may be proved by examined copies. 1 Str. 93, 307. Entries in the books of the Custom-house, of the Bank, of the East India Company, of the South Sea Company, and the like, may be proved in this manner. See 2 L. Raym. 851. 2 Str. 954. 1005. Hardw. 128. 2 Doug. 593, n. 3. Peake, 43. 4 Taunt. 787. But instruments of a private nature, such as a letter found in the corporation chest, 1 Str. 401, or the like, must be proved in the ordinary way, as any other private instrument. So, the books of a private company must be produced, and cannot be proved by examined copies. See Hardw. 130. And it may be necessary to add, that entries even in the public books of a corporation or public company, of matters relative to any property or right claimed by them, can never be evidence for them, 3 Barn & Ald. 142, unless made so by act of parliament. See 1 M. & S. 569. As to the right to inspect such books, and of the application to the court for a rule to enforce it, see 1 Arch. Prac. C. P. 137, and see 1 T. R. 689. 3 T. R. 303, 305, n. 8 T. R. 590. 2 T. R. 616. 4 T. R. 691. 6 Bing. 565. 4 B. & Ald. 301.

To prove a transfer of stock at the Bank of England, an examined copy of the entry in the Bank books must be given in evidence. Peake, 43.

A book containing the names of the passengers by an East India ship, made out by the captain and by him lodged in the Custom house, and by the Custom-house transmitted to the East India House in pursuance of stat. 53 Geo. 3, c. 155, s. 16, and produced from the East India House, was holden to be evidence of the number of passengers, between third parties. 2 Bing. 229. Ry. & M. 66.

An entry in the books of the South Sea Company, of the minutes of a licence granted by them, being a declaration adverse to their interest, was holden to be admissible evidence, without calling the officer who made the entry as a witness. 4 Taunt. 787.

In an action for disturbing a man in the enjoyment of a pew, claimed in right of a messuage, an old entry in the vestry book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage (under whom the present plaintiff claimed) in consideration of his using it, is admissible evidence to prove the plaintiff's right to the pew. 3 Camp. 288. and see 2 Id. 100.

Proof that a curacy has been augmented, may be made by shewing the order for the augmentation entered in a book, and signed by the governors of Queen Ann's bounty; without proceeding to prove that the money was laid out in land, and allotted, &c. &c. 11 East, 478.

Where in ejectment for a house claimed by the lessor of the plaintiff under a devise which described it as lately in the possession of John Young, the land tax collector's book was put in, and an entry in it read, shewing that Young had been assessed and paid the land tax for the house in question; and Abbott, C. J. held it to be good evidence. 1 Car. & P. 218. Ry. & M. 62.

Where in trespass by the lord of a manor, in 1821, the books of his and his ancestors' stewards from 1718 to 1783, shewing the receipt of rents, were tendered in evidence; and it was objected that they were not evidence, without proof of the stewards' hand-writing: the court held that as they were more than 30 years old, it was unnecessary to prove the handwriting; that the rule was not confined to deeds and wills, but extended to other written documents coming out of the proper custody. 4 B. & Ald. 376.

In an action for slander of a physician, in stating that he had *given improper medicines to a child, the plaintiff, in order to shew that the medicine and doses were those usually prescribed, tendered in evidence some medical books: but Tindal C. J. held that they were not evidence; what was sought to be proved, could be proved only by medical men. 5 Car. & P. 73.

Public Acts of State.] The gazette, printed and published by the king's printer, is evidence of all acts of state. 5 T. R. 436. Therefore a gazette, which stated that addresses had been presented to his Majesty from several bodies of his subjects, expressive of their loyalty, was holden to be evidence of that fact. Id. See 2 Camp. 513. The gazette is also evidence of matters advertised in it: see 1 Stark. 418; but in order that such evidence should affect a third party, it is necessary to prove that he was in the habit of reading the gazette. 1 Stark. 186. And in the case of an advertisement in a newspaper, the newspaper cannot be offered in evidence until it be first proved that the party takes it in, or is in the habit of reading it. 1 Stark. 186. 418. 2 Camp. 157.

The king's proclamations in the gazette are also evidence. See 2

Camp. 44. Where a proclamation recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, it was holden to be admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those places. 4 M. & S. 532.

So, the articles of war, printed by the king's printer, are evidence. 5 T. R. 442. 446. See 4 B. & C. 304. So the almanack annexed to the Common Prayer Book. (6 Mod. 81.) is evidence that such a day of the year was Sunday, or the like, Cro. El. 227. 1 Leon. 242. 1 Sid. 300. 6 Mod. 41.

Where it is necessary to prove a license from Government to trade with an enemy's country, and the licence itself is lost or cannot be produced, an examined copy of the order for it in the council book, and also an examined copy of the license in the Secretary of State's office, must be produced. 2 Camp. 605.

A public history or chronicle may be given in evidence, to prove a matter relating to the kingdom in general. Skin. 623. 1 Salk. 281. Thus, Speed's Chronicle was admitted in evidence, to prove the death of Isabel, queen dowager of Edw. 2. Skin. 15. But it cannot be admitted to prove a particular right; and therefore where the question was whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or in a certain place only, Camden's *Britannia* was refused to be received as evidence. Skin. 623. 1 Salk. 281. So, where in an action between two parties, a question arose as to the boundary line between the counties of Brecon and Glamorgan, Alderson, B. refused to allow a passage from a history of Brecknockshire to be read in evidence. 6 Car. & P. 586.

As to the acts of state of foreign governments, see ante, p. 408.

As to the pope's license or bull, in what case it is receivable in evidence, see Gilb. Ev. 76. Palm. 38. 427. Winch. 70. 1 Arch. 17. C. P. 137.

SECT. III.

Written Instruments of a Private Nature.

Deeds.] When a deed is to be given in evidence, the general rule is, that the deed itself must be produced at the trial; 10 Co. 92 b. 93. 1 Mod. 94. Gilb. Ev. 93; a counterpart, 1 Salk 287, 1 Stark. 281, or copy, Gilb. Ev. 93, 94. 1 Mod. 94, or proof of the contents by parol evidence, 10 Co. 92 b. is not sufficient. To this however there are some

exceptions, arising principally from necessity. *First*: We have seen (ante, p. 137.) that where the deed is in the hands of the opposite party, 3 T. R. 153. 5 Co. 75 a, or has been lost by time or accident, or by any other casualty, as by fire, &c. 3 T. R. 151. 153. n. or has been cancelled by mistake. see 2 H. Bl. 250, the party pleading it may state this matter as an excuse for proferet; in which case the cancelled deed may be given in evidence, with proof that it was cancelled by mistake; see Palm. 408. 1 Mod. 211. 1 Vent. 297; or in the other cases, secondary evidence may be given of the deed, see ante, p. 379. (that is, it may be proved by a copy, or even parol evidence may be given of its contents,) 10 Co. 92 b. 1 Mod. 4. Com. Dig. Ev. B. 4., after first proving that the deed has been lost or burnt, &c. Gilb. Ev. 95, or is in the hands of the defendant, and that he has had notice to produce it, Gilb. Ev. 95, 96, or is in the hands of a third person, who has been served with a subpoena *ad duces tecum* for the like purpose. Or if the original deed be found, between the time of pleading and the trial, it may be given in evidence and proved in the usual way. 2 Camp. 557. But if, instead of an excuse for proferet, proferet be actually made in the pleadings, no secondary evidence can be received, but the deed itself must be produced. 4 East, 585, ante, p. 137. And even in cases where a copy is produced, it must be proved to be a true copy, Gilb. Ev. 96, except perhaps where it is an ancient copy, and possession has accompanied the deed. Gilb. Ev. 96. *Secondly*, When, from any other circumstances, the deed itself cannot be produced, it may be proved by secondary evidence: as where the original was in the *Bodleian* library at Oxford, and it was contrary to one of the statutes to remove it; the court allowed an examined copy to be given in evidence, the statute itself being first proved by an examined copy. Bunb. 191. *Thirdly*, Where a deed is enrolled, it is said, a copy of the enrollment is sufficient evidence, provided it be a deed which required enrolment, such as a bargain or sale of a fee or freehold; Gilb. Ev. 97. 99; but this has been doubted; Bul. N. P. 255, 256; and it is better therefore to produce the deed, if it be in the party's possession. But, if it be lost, &c., then it may be proved by an examined copy of the enrolment. Ante, 306. And *lastly* where the matter of one deed is recited in another, if the latter be produced, it is said to be unnecessary to prove the former, as between the parties to the deeds or those claiming under them. 2 P. Wms. 432. See ante, p. 205, 206. but see Gilb. Ev. 98.

*Next, as to the proof of the execution of the deed: if there have been no subscribing witness to the deed, then proof of the handwriting of the parties will be sufficient; the law in such a case presuming a delivery. See 1 Arch. Pr. C. P. 138. Peake R. 108. And

where a written instrument, signed merely with the mark of the party, and to which there was no attesting witness, was produced in evidence at a trial, and a witness proved it, stating that he had often seen the party so signing instruments, and pointing out a peculiarity in the mark : Tindal, C. J., after some hesitation, admitted the proof as sufficient. Moody & M. 516. But if the deed were attested, the execution must be proved by at least one of the subscribing witnesses, 7 T. R. 266. Peake, 44. 4 Esp. 240. 10 Co. 93 a. Gilb. Ev. 99. and see 1 Camp. 303. 2 Camp. 510. 2 Stark. 281. 1 Esp. 184, even after the deed has been cancelled, Peake R. 44, unless perhaps the fact of execution is one of the admissions in the cause ; see 1 Camp. 375. 2 Sid. 269. Gilb. Ev. 103 ; for even the acknowledgment of the party, or his admission in an answer to a bill of discover, are in this case deemed merely secondary evidence, and not sufficient. 1 Esp. 69. 5 Id. 16. 4 East, 59. see 5 T. R. 366. It does not appear necessary that the subscribing witness should swear that the deed was actually *executed* in his presence ; if he were afterwards desired to attest it by the party who executed it, Peake, 198. 1 Esp. 97, or in the presence of the party, 3 Esp. 171, 2 B. & P. 217, and he attest it accordingly, this will be sufficient, provided the attestation and execution be done so nearly at the same time as fairly to be deemed parts of the same transaction. MS. E. 1814. And where the attesting witness proved that he saw the party sign the deed, but whether it was then sealed or not, or whether the party delivered it, he could not say, Best, C. J. held that as the deed purported to be sealed and delivered before attestation, the sealing and delivery of it should be presumed. 1 Car. & P. 417. and see Peake R. 198. On the other hand, a person who even sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. 3 Camp. 232.

A joint and several promissory note was given by A. and B., and to A.'s signature there was a subscribing witness ; in an action upon it against B. only, it became necessary at the trial to prove a payment by A. upon account, and to prove that A. who paid the money was the person who signed the note ; Held, that this could be proved only by the subscribing witness, even although B. became a party to the note as surety for A., and A.'s signature was to it at the time B. signed it. *Wylde et al. v. Porter*, 1 Ad. & E. 742.

Per Bayley, J. " Where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of

the execution of the deed, though the witness add that he has no recollection of the fact of the execution of the deed." *Mungham v. Hubbard et al.* 8 B. & C. 14. S. P. Per Taunton, J. R. v. *St. Martin's, Leicester*, 2 Ad. & E. 218.

To this rule of proving the execution of a deed by the evidence of an attesting witness, however, there are many exceptions. First, Where the execution forms one of the admissions in the cause. *Semb.* see 1 Camp. 375. 2 Sid. 269. Gilb. Ev. 103. Secondly, In an action on a deed, where the deed is put in issue, payment of money into court generally, or upon the count setting out the deed, or on any of the breaches in that count, as for instance, in any of the breaches in covenant, dispenses with the necessity of proving the deed. 2 Camp. 857. Thirdly, Where the matter of one deed is recited in another, if the latter be produced and proved, it is said to be unnecessary to prove the former, as between the parties to the deeds of those claiming under them. 2 P. Wms. 432. Com. Dig. Ev. B. 5. See ante p. 205, 206; but see Gilb. Ev. 98. Fourthly, Where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the *enrolment, as already mentioned, ante p. 396. 418. Fifthly, Where the deed is 30 years old or upwards the court will presume that it has been duly executed, and will not require the execution to be proved, Bul N. P. 255. 1 Esp. 275. 278, even although the attesting witness be alive, Gilb. Ev. 94, provided possession have followed the deed, Id. 100, or that some satisfactory account be given of it, 3 Taunt. 91, and provided there be no rasure or interlineation in it, and that it do not import fraud; Gilb. Ev. 100, 101; otherwise it must be proved, as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting. And the same rule seems to apply to ancient copies, where the original deeds have been lost. See 1 Lev. 25. Gilb. Ev. 97. Sixthly, If the name of a fictitious person be put as the only subscribing witness, evidence of the handwriting of the party alone will be sufficient. Peake, 33. So, if the subscribing witness be dead, Com. Dig. Ev. B. 3. 1 Barn. Ald. 19. and see 6 East, 75. Moody & M. 79, or have become insane. 12 Vin. Abr. 224. 3 Camp. 283, or blind, see 1 L. Raym. 734, or be abroad, out of the reach of the process of the court, Peake, 135. 1 Esp. 2. Moody & M. 286. 1 B. & P. 360. 7 T. R. 265. 12 Vin. Abr. 224. and see 1 Stark. 90, whether domiciled there or not; 2 East, 250; or if he have set out for the purpose of leaving the kingdom; 1 Taunt. 461; or if from circumstance it may fairly be presumed that

he has left the kingdom ; 2 Camp. 282. 3 Car. & P. 555 ; or if it appear that he is serving in the navy, 2 Taunt. 223, or the like ; or if after a *bona fide*, serious and diligent inquiry he cannot be found ; 1 Doug. 93. 2 East, 183. 7 T. R. 266. 1 Camp. 303. 1 Taunt. 364. 2 Camp. 282. 2 Car. & P. 296. 4 B. & Ald. 697. 9 Bing. 359 ; or if he be a party to the action ; Moody & M. 176 ; or have since become interested in the event of the suit, by marriage, or by being executor or administrator to the party ; 2 Esp. 697. 5 T. R. 871. 1 Sir. 34 ; or perhaps by becoming partner with the party ; see 5 Bing. 493 ; or if he have become otherwise incompetent as a witness : 2 Str. 833 ; then, upon proof of any one of these circumstances, you will be permitted to give secondary evidence of the execution of the deed, that is, you may prove the deed by proving the handwriting of the witness, see 1 Barn. & Ald. 19. 1 B. & P. 360, even although the party signed it with his mark only. 3 Car. & P. 613. Moody & M. 176. But the witness merely being ill, however dangerously, will not, it seems, be sufficient to let in such evidence. 3 Camp. 457. So, if the witness were incompetent at the time he attested the deed, 5 T. R. 371, or if he have since become interested by the voluntary act of the party interested in the proof of the deed, 5 Bing. 493, then it will not be sufficient to prove merely the witness's handwriting to the attestation, but the deed must be proved as if there was no witness to it, that is to say, by proving the signatures of the parties. Also, if there be two witnesses to the deed, and any of the circumstances just now mentioned apply only to one of them, the deed must of course be proved by the other. By stat. 26 Geo. 3, c. 57, s. 38. bonds, deeds, or other writings executed in the East Indies, when the subscribing witnesses are resident there, may be given in evidence in Great Britain, upon proof of the handwriting of the parties and of the *witnesses. *Seventhly*, If the deed appear to be attested by one or more persons, but in point of fact these persons never saw the deed executed or delivered, the attestation may be deemed a nullity, and the deed be proved by proving the handwriting of the party. 2 Camp. 635, 636, n. 3 Esp. 173, n. Peake, 198. 7 Taunt. 251. See 1 Camp. 412. cont. *Eighthly*. When a deed is in the hands of one of the parties to an action, and the other gives him notice to produce it, and it is not produced, the latter may give secondary evidence of the deed, without calling the subscribing witness, even although the subscribing witness be known to the party, and might easily be produced. 8 Taunt. 450. Where the deed however is produced upon notice, the old rule upon the subject was, that by producing it, the party admitted that it was properly executed, and there was no necessity to prove it by the attesting witness ;

2 T. R. 41 ; but that rule was afterwards repudiated, and it was holden that the party calling for the instrument, must, when it is produced, prove it by the attesting witness, in the same manner as if he himself had produced it, whether the instrument was a deed, 8 East, 548, or an agreement &c., not under seal. 2 Camp. 94. 6 Esp. 101. This rule however has since been qualified by other decisions, by which it is now established that where a party producing a deed upon notice, claims or takes an estate or interest under it, the opposite party is not bound to prove it by the subscribing witness : therefore, where a defendant gave the plaintiff notice to produce a lease under which he held certain lands, for the purpose of shewing that the *locus in quo* was not comprised in it, and the plaintiff accordingly produced it at the trial, it was holden that the defendant might give it in evidence, without proving it by the attesting witness. 3 Taunt. 60. So where the defendants, who were assignees of a bankrupt, produced the assignment to them from the commissioners, upon notice, it was holden that the plaintiff might give it in evidence without proving it by the subscribing witness, for the same reason. 3 Brod. & B. 139. So, in an action to recover a deposit paid upon the sale of an estate, the plaintiff gave the defendant notice to produce the contract under which the deposit was made, and he accordingly produced it, Lord Tenterden, C. J. held, that as the defendant had received the deposit under the contract, he must be considered as taking an interest under it within the rule lastly above mentioned, and that the plaintiff therefore was not bound to prove the contract by the subscribing witness. Moody & R. 143. So, in ejectment by an heir at law, to try the validity of a will, notice was given him to produce a lease from the ancestor, under whom he claimed, to the defendants, which was then unexpired, and he produced it accordingly, Bayley, J. held, that as it was granted by the ancestor under whom he claimed, he could not dispute the execution of it, and that the defendants therefore were not bound to prove it by the subscribing witness. 2 Car. & P. 462. Also where in ejectment by a devisee, it appeared that the attorney for the lessor of the plaintiff obtained from one of the tenants in possession the lease under which he held, evidently for the purpose of preventing the defendants from setting it up as a defence to the action ; but upon notice being given to produce it at the trial, it was produced accordingly : *the court held that it was not necessary that the defendants should prove it by the attesting witness ; the lessor of the plaintiff was to derive a benefit from the possession of it, and the conduct of his attorney amounted to a recognition of it as a valid instrument. 6 B. & C. 28. So, in an action of covenant by the executors of a lessee, against a person to whom they had assigned the term, for not repairing

the defendant (who was not then in possession, but had assigned his interest to one Daniel, by an assignment reciting the original lease,) being called upon at the trial to produce the original lease, got Daniel to produce it, and then insisted that the plaintiffs should prove it by the attesting witness before they could give it in evidence: but it was holden that although the defendant did not then hold under the lease, yet as he once held under it, he could not dispute its execution; nor could he do so after reciting it as a good and valid lease in his assignment to Daniel. 5 B. & C. 589. But where a trader had assigned to his bankers by deed his book debts, and gave them authority to collect them, and they did collect some of them, but afterwards, on the bankruptcy of the trader, they gave up the deed and the money collected to the assignees: afterwards, at the trial of an action brought by the assignees against the bankers, the plaintiffs produced this deed, and wished to give it in evidence, without calling the attesting witness, on the ground that the defendants had acted upon and taken a benefit under it; but the court held that they could not do so, the case did not come within the exception established by the above decisions, as there the deed was produced by the adverse party for the first time at the trial, here it was produced by the parties who had to prove it, and it had been several months in their possession, so that they had abundant time to find the attesting witness, and produce him to prove the deed. 1 B. & Ad. 145. *Ninthly*, In an action against a sheriff for taking insufficient pledges in replevin, if the replevin bond be produced by the defendant upon notice, it may be given in evidence by the plaintiff, without proof of its execution. 3 Stark. R. 169. And *lastly*, where the deed is lost or destroyed, secondary evidence may be given of its contents, without calling any witnesses to prove its execution, unless it appear not only that there was a subscribing witness to it, but also that such subscribing witness was known and might be produced. Peake, Ev. App. 82. but see 2 Stark. 528.

As to the proof required of the execution of a deed or other written instrument, in the cases now mentioned, where the attesting witness is dead or cannot be produced, perhaps the most satisfactory rule upon the subject would have been, to allow the instrument to be treated as one which had not been attested, and to require proof of the party's handwriting. This however is not the rule adopted; and by a variety of decisions, and the invariable practice for a long period, it is fully established that the proof required in such a case is, not of the handwriting &c. of the parties, but of the handwriting of the subscribing witness only; excepting however the case of bonds, deeds and other writings executed in the East Indies, which, if produced in any court in this country, whilst

the attesting witnesses are in India, must, by the express words of a *statute (26 Geo. 3. c. 57 s. 3^d.) be proved by proving the handwriting both of the parties and of the witnesses. In one case, (*Nelson v. Whittall*, 1 B. & Ald. 19.) which was an action by the indorsee against the drawer of a promissory note Bayley, J. held, that proof of the handwriting of the subscribing witness alone (who was dead) was not sufficient, but the plaintiff should also have proved that the defendant was the person who signed the note; but the other Judges, Lord Ellenborough, Abbott and Holroyd, held that proof of the witness's handwriting was sufficient evidence of the making of the note, and, it being proved that the defendant was present when it was written, that was sufficient evidence of his identity; and Abbott J. intimated that he thought evidence of the handwriting of the attesting witness alone, without any proof of identity, would have been sufficient. And the opinion which he then intimated, he constantly afterwards acted upon at nisi prius; see *Moody & M.* 79; and in one case he ruled so, where the action was upon a bond executed by a marksman. *Moody & M.* 176. see also 3 C. & P. 613. Other judges have also ruled in the same way, *Moody & M.* 286. 3 Car. & P. 555. But in a late case in the court of Exchequer (*Whitelocke v. Musgrave*, 1 Crompt. & M. 511), Bayley, B. although he admitted that proof of the handwriting of the party was not required in such a case, held, that as proof of the attesting witness's handwriting merely proved the execution of the instrument by some person of the name therein mentioned, other evidence must be given of the identity of that person with the defendant or party sought to be charged, if that did not sufficiently appear, by way of description or otherwise, on the face of the written instrument; and the other judges of the court expressed the same opinion. The case now mentioned was an action by an indorsee against the maker of a promissory note, which was tried before Bayley, B. in London; the note appeared to be signed by a marksman, and was attested by a witness; it was proved that the attesting witness was gone to America, and his handwriting to the attestation was proved, but the witness who proved this (and who was the only witness called) said that he knew nothing of the defendant, and could give no testimony which could in any manner connect him with the note in question; Bayley, B. thereupon nonsuited the plaintiff, with liberty to move to set aside the nonsuit and enter a verdict: a motion being accordingly made, and a rule nisi granted, which was afterwards argued, the Court, after taking time to consider the point, afterwards expressed an unanimous opinion that as there was nothing on the face of the note, either by way of description or otherwise, which identified the party signing it with the defendant, evidence of that identity should

have been given, to entitle the plaintiff to recover ; the rule was accordingly discharged. 1 Crompt. & M. 511. And the rule, thus qualified, would now, I think, be recognized as the rule upon the subject, by all the courts. See 4 Camp. 34. 2 Stark. 239, accord.

The handwriting of a witness or party may be proved by some person who has a knowledge of it from having seen him write, see 4 Esp. 37. 1 Esp. 14, or from having been in the habit of corresponding with him, 1 W. Bl. 384, particularly if he have acted upon *the letters he received from him. See 2 Car. & P. 21. But it cannot be proved by comparing it with other writings, although confessedly of his handwriting, 4 Esp. 37. 117. 1 Esp. 14. 4 Car. & P. 1. Peake, 29, unless the witness actually saw him write that with which he compares the handwriting, 1 Holt, 420, or unless perhaps where there is already contradictory evidence of the fact, 1 Esp. 351. 4 T. R. 497, or where the writing is so ancient that no witness can be found to prove it. 14 East, 337, n. 7 East, 282, n. and see Peake, 30, n. Where a witness, called to prove the signature "L. B. Sapio" to a bill of exchange, said that he had often seen that person write his name, but it was always "Mr. Sapio," it was thereupon objected that as he had not seen him write the whole name, his evidence as to part only could not be received ; but Lord Tenterden C. J. held, that as the witness believed the surname to be written by the party, it was quite enough. Moody & M. 39. see 2 Stark. R. 164. cont. In an action against a shipowner, named Samuel Fry, a witness, called to prove his handwriting to some letters, stated that he had never seen the defendant, but that he had corresponded with a person of that name residing at Plymouth Dock, and the letters he believed to be in that person's handwriting ; and another witness proved that the defendant was a shipowner residing at Plymouth Dock, and that there was no other person of that name there ; Best, C. J. held this to be sufficient evidence of the handwriting to go to the jury. Ry. & M. 90. Where an attorney, called to prove another attorney's handwriting to some letters, stated that he had never seen him write, but that he had seen letters, purporting to be from him, in a cause in which he was engaged as attorney on one side and the witness on the other, that he, the witness, had acted upon those letters in the course of the cause, and he believed the letters to be in his handwriting ; it was objected that this was not sufficient proof of the handwriting, as the letters were not addressed to the witness ; but Lord Tenterden, C. J. admitted the evidence, saying that the evidence, of clerks was frequently admitted in such a case, who derived their only knowledge of the handwriting they came to prove, from seeing the letters of the party which have been received at their masters' counting houses. 5 Car. & P.

218, 213. But where a plaintiff's attorney proved that he believed a letter to be in the handwriting of the defendant, from having seen other papers in the master's office, admitted to be in his handwriting by his attorney, and which he acted upon, Abbott, C. J. held this not to be evidence, it being nothing more than a comparison of hands. 2 Car. & P. 477. see 5 Car. & P. 196, *semb. cont.* The rule as to comparison of hands, however, is confined entirely to witnesses; it does not prevent the court or jury from comparing the handwriting of two or more documents, after they are properly in evidence. 1 Crompt. & J. 47. Formerly it was holden, that a person who was skilled in the detection of forgeries, might prove that a writing was in a feigned hand, though he never saw the party write; 4 Esp. 117. 1 Esp. 14. 4 T. R. 497. and see 2 Esp. 714; but this has since been holden not to be evidence. 4 Car. & P. 2. per Lord Tenterden, C. J.

Where an instrument, having a seal affixed to it, purporting to be a corporate seal, is produced in evidence, proof must be given that it is the seal of the corporation. 8 T. R. 307. The common seal of the city of London, however, proves itself; per Lord Kenyon, C. J., 1 Esp. 58; therefore a deed or other instrument under that seal, may be put in evidence without further proof.

Where a deed or other instrument is executed by an agent for a principal, in an action upon it there must be some evidence of an authority given by the principal to him to execute that particular instrument, or instruments of that description generally, or that the principal recognized that or similar acts of the agent as having been done by his authority, so as to satisfy the jury that the agent had the authority of the principal for what he did. But this in many cases may be sufficiently implied from the nature of the relation between the principal and his agent, or from other circumstances in the case. Thus, where a sheriff sold a lease of some premises under a *fiery facias*, and W., who acted as under-sheriff, executed the assignment of it to a purchaser in the name of the sheriff, and under the seal of office: in proving the assignment, it was holden not to be necessary to prove that B. was under-sheriff, for his acting as such was sufficient proof of his appointment; nor was it necessary to prove any authority from the sheriff to execute the assignment, for as under-sheriff he had such authority *virtute officii*. 5 B. & Ald. 243. So where a contract by deed, executed by the clerk and solicitor to the East London Waterworks Company, for them and in their name, was given in evidence, Lord Tenterden, C. J. held that it was not necessary to prove any special authority from the Company to him to do so. Moody & M. 149.

Care must be taken that the deed, &c. is properly stamped; if it be

not, it cannot be given in evidence for any purpose. Where by parol agreement between A. and B., the one agreed to let and the other to take certain premises, upon the same terms and conditions as were contained in a written agreement, by which A. had before then let the same premises to one W.; in an action by A. against B., for rent of the premises, and for not repairing them, the written instrument referred to was produced, stamped with an agreement stamp, but, upon examining it, it appeared to be a lease, and not merely an agreement, and on that account was not allowed to be given in evidence; the court held that it was properly rejected, as not having a lease stamp. 7 B. & C. 625. Moody & M. 131, S. P. and see 3 B. & C. 665. So where upon a bill of exchange becoming due, the acceptor prevailed upon the drawer to renew it, and the renewed bill was written upon the back of the other, without a fresh stamp, and a line was drawn through the name of the acceptor; when the renewed bill became due, it was not paid, and the drawer, as he could not maintain an action upon it for want of a stamp, sued the acceptor upon the original bill: at the trial, the principal question was, whether the first bill had been cancelled with the consent of the drawer, and in order that they might more fully form their opinion upon it, the judge allowed the unstamped bill to be submitted to their view; but the court held, that as the jury were required to draw a conclusion of fact from this latter instrument, it ought not to have *been submitted to them, as it was not stamped. 9 B. & C. 365. So, where certain unstamped memoranda, purporting to be accounts of rent due and receipts for the same, were tendered in evidence by a defendant in replevin, to prove the holding of the plaintiff at a particular rent: it was holden that they could not be received in evidence; being receipts, they could not be given in evidence without being stamped as such. 5 D. & R. 512. Even a contract, &c. made in a foreign country, which by the laws of that country would be void for want of a stamp, cannot be given in evidence in this country unless it have such stamp; 7 T. R. 241; but in order to make the objection, it is necessary first to prove the law of the foreign country by which the stamp is required. 3 Camp. 166. and see 10 B. & C. 449. So, if a parol agreement be afterwards reduced to writing and signed by the parties, no evidence can be given of it if the agreement be not properly stamped; not of the parol agreement, for it was afterwards reduced into writing; and not of the written agreement, because it was not properly stamped: 2 B. & Ald. 478. and see 2 Brod. & B. 90; and this even in a case where the evidence is adduced, not for the purpose of enforcing the instrument, but merely to prove a collateral fact, such as the yearly value of a tenement, 3 B. & Ald. 588, or the like. Indeed

in all cases where by the stamp laws a written instrument cannot be stamped after it is signed or executed, such as in the case of a bill of exchange, promissory note, &c. if such instrument have no stamp, or have not the stamp required by law, it may be treated altogether as a nullity; and if the party can prove his cause of action or defence, &c. without resorting to it, he may. Thus, where, in an action for goods sold, it appeared in evidence that the defendant had given in payment for them, a bill of exchange drawn by him upon and accepted by a third person, which was not paid when due, but no notice of the dishonour was given to the defendant: yet, as it appeared that the bill was on a wrong stamp, the court held that the action lay, and that want of notice was no answer to it; the bill not having a proper stamp, it was nothing more than a piece of paper, of no value, and the want of notice therefore could make no difference. 1 B. & Ad. 696. and see *1 East*, 58. If there be two parts of a written instrument, both executed at the same time, the one stamped the other unstamped, the unstamped part is receivable as secondary evidence of the stamped part. 1 Camp. 501. So, where the plaintiff had lost his part of an agreement under seal, which was stamped, and gave the defendant notice to produce the counterpart, and at the trial the plaintiff, after proving the loss of the deed, offered in evidence the draft of it, and the defendant at the same time produced his counterpart, it was holden that the counterpart was good evidence of the lost deed, though it was unstamped. 3 Bing. 292. see *2 Young & J.* 116. So, where a party refused to produce the original deed upon notice, Lord Ellenborough, C. J. said that he would presume that it was properly stamped. 1 Stark. 35. So, where an old deed has been lost, the court will presume that it had whatever stamp was required by law at the time of its execution. 7 East, 45. But as this is only presumption, it may, as all other *presumptions, be rebutted; but it must be rebutted, if at all, by the fact of its being really unstamped appearing from the evidence, or from the examination or cross examination of the witnesses, produced on the part of the party seeking to give evidence of the written instrument, and not by means of evidence given by the opposite party. Thus, where in an action for work and labour, after the plaintiff had closed his case, the defendant produced a written agreement, under which it was alleged the work was done, but not being stamped it could not be read in evidence; he then contended, that as the work was done under a written contract, the plaintiff, as he had not produced and proved it ought to be nonsuit; but the court held, that as it did not appear from the examination or cross-examination of the plaintiff's witnesses that

there was any written contract, the defendant, if he wished to set up one, ought to have produced it in such a state as to be receivable in evidence, and prove it as part of his evidence. 6 Bing. 332. and see 8 Taunt. 327. 4 B. & Ad. 268. 6 B. & C. 708, and ante, p. 377, 378. Where a defendant proposed to give parol evidence of a written agreement between him and the plaintiff on the subject of the alleged cause of action, on the ground that it had been snatched out of his attorney's hands by the plaintiff, who destroyed it; but as it appeared from the testimony of the defendant's witness to have been unstamped at the time the court held that no secondary evidence could be given of it. 2 B. & Ald. 478. But where an unstamped agreement was drawn up, but not signed by the parties, it was holden that this did not prevent the party, who sued upon it, from resorting to the common counts. 2 Stark. 277. 8 Taunt. 327. So, where A. made an offer in writing to B. of some brick earth, upon the same terms as B. had engaged with C. for other brick earth, and B. in some days afterwards verbally agreed to take it upon the terms offered, which terms were then again mentioned; and at the trial of an action by A. for a breach of the agreement, he proved the parol agreement, and put in evidence the contract between B. and C., which was written and duly stamped; but the defendant insisted that he should also put in evidence the written offer, (which he then produced upon notice,) and as that was unstamped, the plaintiff must be nonsuit: but the court held that this written offer did not require a stamp, as it was not an agreement, but a mere proposal; that the agreement was subsequent to it, and by parol, and that being proved, it was not incumbent upon the plaintiff to give any evidence of this offer. 3 B. & C. 665. Where a receipt and agreement were written upon one piece of paper, having a receipt stamp only, it was holden to be receivable as evidence of the receipt, although not of the agreement, the one not being in any manner controlled or qualified by the other. 1 Camp. 387, and see 1 Stark. 437.

A writing indorsed on a deed subsequently to its execution, forms no part of the deed, MS. H. 1815, and consequently must have a separate stamp, if a stamp be at all necessary to give it operation, considered as a separate instrument. See 1 Stark. 53. Therefore where an indorsement was made upon an agreement by the parties to it, some time after it was signed, by which the *agreement was qualified and altered, it was holden that the indorsement could not be given in evidence, because it was not stamped; nor could the original agreement be given in evidence by itself, because it appeared to be altered and qualified by the indorsement. 7 B. & C. 281. So, where a policy of insurance on ship and outfit, was, after the inception of the risk, altered by a memoran-

dum on the face of it, whereby it was agreed that it should be an insurance upon ship and goods, it was holden that it could not be given in evidence as altered, without a new stamp. 8 East, 377, nor could the alteration be rejected, and the policy declared upon as in its original state, for it appeared to have been since altered by the parties. 1 Camp. 72. 9 East, 351. So, any alteration in a material part of a bill of exchange or promissory note, after it is in a negotiable state, and in the hands of a holder who by law may sue upon it when due, will prevent it from being receivable in evidence without a new stamp; 2 H. Bl. 141. 5 B. & Ald. 674, and see 7 B. & C. 416, and post, vol. 2; and as by the stamp laws no new or additional stamp can be put to such bill or note, such alteration has practically the effect of invalidating it as a security. But an indorsement upon a deed, after it has been signed by the parties, but before the sealing and delivery, is deemed a part of the deed, and may in all respects be treated as such. 1 Stark. 162.

The stamps required to particular instruments, shall be fully stated, when we come to treat of the actions upon those instruments respectively in the second volume. There are some observations, however, which apply to the subject generally, which it may be convenient to insert in this place.

First: In ascertaining the stamp required to be fixed to any particular instrument, the court will only look to the consideration, &c. appearing upon the face of the instrument; if that be falsely stated, and that a greater consideration was in fact given, although that may subject the party to a penalty under the stamp laws, it does not invalidate the instrument, or prevent it from being given in evidence. 10 B. & C. 673, and see 5 M. & S. 228. And where a bond, bill or note, is given to secure a particular sum, and also the interest which may thereafter accrue, the stamp must be calculated upon the principal sum, and it does not require any greater stamp on the ground of its securing the payment of interest also. 4 B. & Ald. 204. But where a bond in the penal sum of £2000, after reciting that A. & B. bankers, had consented to discount bills and otherwise advance money to the extent of £1000 for C., and that the defendant had consented to become surety for C., was conditional for C.'s repaying all such money as A. & B. should so advance, &c. together with all such lawful charges and allowances for advancing and paying such bills, &c. as are usually charged by bankers in such cases; the stamp on the bond being for £1000 only, was holden not to be sufficient, as the bankers, by the condition, were entitled to sue upon the bond, not only for £1000 advanced to C., if they had advanced so much, but also for the amount of their commission and charges. 1 B. & Ad. 343. And the sum for which any deed or instrument

is a security, must be *limited on the face of the instrument, to render an *ad valorem* stamp sufficient for it ; if it be not so limited on the face of the instrument, the instrument must be deemed to be a security for an unlimited sum, and must be stamped accordingly. Therefore, where a mortgage for £1500, also contained a covenant on the part of the mortgagor for the payment of the premium on a policy of insurance for £1000, (not then effected) on a particular life for seven years, and it was stamped with a £6 stamp, which was sufficient for any sum from £1000 to £2000 ; the court held it to be insufficient ; the stamp should have been £25, as for a mortgage for an unlimited amount. 2 B. & Ad. 807. It often occurs in the Stamp Act (55 Geo. 3, c. 184,) that an additional duty is charged, if the deed or other instrument contain more than 1080 words ; and in this respect any "schedule, receipt or other matter put or endorsed thereon or annexed thereto," is reckoned as part of the deed, and the deed must be stamped accordingly. See 55 G. 3, c. 184, sch. pt. 1. 3 East, 326. 7 B. & C. 391. But where an agreement contained a provision for referring disputes between the parties to arbitration, and a subsequent agreement between the same parties referred to that provision, and it was agreed that it should extend to such second agreement "in like manner as if the same had been therein repeated ;" and it was objected at the trial of an action, in which both agreements were given in evidence, that this second agreement must be considered as embodying the provision in the first, and if that were to be reckoned, both together would exceed 1080 words, and the stamp was insufficient : but the court held that it was only schedules, receipts, or other matter put or endorsed on the instrument or annexed thereto, which, according to the words of the statute, could be deemed a part of the instrument, with reference to the stamp duty ; that the provision in question therefore was not to be deemed a part of the second agreement for this purpose, and the stamp was sufficient. 7 B. & C. 390.

Secondly : "All instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law ; except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof." 55 G. 3. c. 184. s. 10.

Thirdly : Where any document, requiring a stamp, and intended to be given in evidence, is found to be either without stamp, or impressed with one which in law is insufficient, this in many cases may be remedied by application at the stamp office, where upon payment of a certain

penalty the proper stamp will be affixed to it. Upon this subject the following provisions have been made by the Stamp Acts:—By stat. 23 Geo. 3. c. 58. s. 5, it is provided, that “no memorandum or agreement not stamped, shall be deemed to be void, in case the same shall be stamped at the head office, or the said duty shall be paid thereon, and a receipt given thereon for the same by the proper officer receiving such duty, within 21 days *after the same shall have been entered into.” By stat. 35 Geo. 3. c. 55. s. 11, “if a receipt, discharge or acquittance given upon the payment of money, which is not stamped, shall be brought to the commissioners of stamps or their officers, at any time within 14 days after it shall be given or shall bear date, it shall be stamped with the proper stamp, on payment of the duty and a penalty of £5; or if so brought within one calendar month, then upon payment of the duty and a penalty of £10.” By stat. 37 Geo. 3. c. 136, s. 2, where a parchment or paper, on which, “any matter or thing (except bills of exchange, promissory notes, or other notes, drafts or orders) shall be printed or written, shall be brought to the commissioners to be stamped after the same shall have been executed, the same not having been stamped with any stamp, or having been stamped with a stamp of less value than is by law required, and the person producing the same is desirous of having it duly stamped, the commissioners may order it to be stamped, on payment of the duty and a penalty of £10 for every such parchment or paper.” And by sect. 3, “if such instrument be brought to the commissioners within 60 days after the making or execution thereof, and they shall be satisfied, by oath or otherwise, that the same was printed or written on parchment or paper not duly stamped, either by accident or inadvertency, or from urgent necessity or unavoidable circumstance, and without any intention in any party or parties thereto to defraud his Majesty of the duties payable thereon,” the commissioners may remit the said penalty or any part thereof, as they shall deem expedient. See 3 Camp. 105. And by stat. 44 Geo. 3. c. 98. s. 24, where in any case it shall appear to the commissioners, upon oath or otherwise to their satisfaction, that “any instrument, matter or thing whatsoever (except bills of exchange, promissory notes or other notes, drafts, orders or receipts) hath been printed or written on parchment or paper not duly stamped, either by accident or inadvertency, or from urgent necessity or unavoidable circumstances, and without any wilful delay or intention in any party or parties thereto to evade the duties or to defraud his Majesty thereof,” and such instrument shall be brought to the commissioners to be stamped within 12 months from the making or execution thereof, the commissioners may remit the penalty payable on stamping the same or any part thereof as they may deem expedient. By the last general

Stamp Act, 55 Geo. 3, c. 184, s. 9, it is provided, that "the provisions and regulations of former Acts relating to agreements, shall be applied only to such agreements as are hereby charged with a duty of £1; and that the agreements hereby charged with a duty of £1 15s. shall be subject to the same provisions and regulations as deeds hereby charged with the like duty." But by stat. 35 Geo. 3, c. 63, which provided for the stamps on policies of insurance on ships, &c. it is expressly provided by sect. 14, that the commissioners shall not have the power to order any such policy to be stamped after the same has been engrossed, &c.; and this section of the statute, it seems, is not affected by the other provisions above mentioned, but policies of insurance, like bills of exchange, &c. cannot legally be re-stamped upon any application to the *commissioners. See 3 Camp. 103, 105. The practice at the stamp office, under the authority of these several Acts, I believe to be this; upon application within 21 days to have an agreement stamped, which requires but a £1 stamp, it will be done, upon payment of the duty merely; upon application after the 21 days, it will be done on payment of the duty and a penalty of £5; upon application to have a deed or other instrument (not being a policy of insurance, bill of exchange, promissory note, draft or order,) stamped, they will do it, upon payment of the duty and a penalty of £5: but they seldom if ever remit the penalty, even upon oath made as above mentioned, or although the application be made within 12 months. In an action by the indorsee against the indorser of a bill of exchange, the bill when produced in evidence was properly stamped, but it was proved by the defendant not to have been stamped when drawn, nor for some time afterwards; Lord Kenyon, C. J. held, that as it was thus properly stamped; it was sufficient, and he would not inquire when it was stamped; much inconvenience would arise, and a great check be put upon paper credit, if the objection was to be allowed. Peake, R. 230. But in a subsequent case, which was an action by an insurance broker against his principal, a policy of insurance (which upon a former trial for the same cause was not permitted to be given in evidence on the ground of its not being properly stamped, and the plaintiff was then nonsuit,) was now tendered in evidence, the commissioners having since allowed it to be stamped on payment of a penalty: this was objected, as all authority to allow it to be so stamped had been expressly taken from the commissioners by stat. 35 Geo. 3, c. 63, s. 14, 16; and Lord Ellenborough, C. J. held that the statute was imperative upon him, and he could not allow it to be given in evidence. 3 Camp. 103. So, where a letter was tendered in evidence, which was not stamped at the time it was written, but shortly before the trial was stamped with an agreement

stamp of £1 on payment of a penalty; the court held it to be an order for the payment of money, which the commissioners had no authority by law to stamp after it was signed, and that therefore it could not be given in evidence. 2 Brod. & B. 78. and see 1 B. & Ald. 36. So, where an instrument originally written upon a receipt stamp, was afterwards stamped with an agreement stamp of £1 on payment of a penalty, and a minute thereof indorsed on it at the stamp office; it turned out to be an order for the payment of money, and it was objected to as not being stamped as such; to this it was answered, that as the £1 stamp on it did not purport on the face of it to be appropriated to any particular instrument, and as that was sufficient to cover the amount, it was rendered sufficient by stat. 55 Geo. 3, c. 184, s. 10, and as to the time at which such stamp was affixed, the court would not inquire into it; but the court held that such an inquiry was admissible, and the fact of the stamp being affixed subsequently to the drawing of the order appeared from the minute indorsed upon it; and as the commissioners had no authority to order a stamp to be subsequently affixed to such an order, it could not be given in evidence. 4 B. & C. 235.

**Wills.*] A will of personal property may be proved by a copy of the probate, as mentioned ante, p. 401. It seems the will itself cannot be received in evidence, until it has been proved in the Ecclesiastical Court; Doug. 707. See 1 Stark. 243; and after it has been proved, the probate, and not the will itself, is deemed the best evidence. 8 B. & C. 335. But where in an action against an executor, notice was given to him to produce the probate, and upon his not producing it at the trial, an officer from the Ecclesiastical Court produced the will itself, this was holden to be good, as a kind of secondary evidence. 1 Brod. & B. 219. See ante, p. 401, 402.

A will of lands in fee or *pur autre vie*, must be produced at the trial, and proved by one of the witnesses who attested it; 1 Esp. 391. Skin. 413. 2 Str. 1253. 1 W. Bl. 8; if the opposite party wish, he may call the other two. Bul. N. P. 264. If the will be lost or destroyed, the contents of it may be proved by a copy, 2 Camp. 389, or by parol evidence; Id. 390, n.; but the probate is no evidence whatever of a will of lands. Id. 389. Gilb. Ev. 71. ante, p. 402. The attesting witness called, should be prepared to give parol evidence of every circumstance attending the attestation, necessary to shew that the will was duly executed and attested according to the direction of the Statute of frauds: 1 Arch Pr. C. P. 140: that is, he should prove that the testator signed it, see 1 Vez. 478, 3 Bur. 1775, or acknowledged it to be his last will and testament, 3 P. Wms. 254. 1 Vez. Jun. 11. and see 2

New Rep. 415, in his presence; and that he, the witness, subscribed his name to the attestation, in the presence of the testator, 20 C. 2, c. 3, s. 5, or at least, in such a situation that the testator might at the time have seen him, and most probably did see him, do it. See Carth, 81. 2 Salk. 688. 1 Bro. Ch. Ca. 99. Where the witnesses signed it in an adjoining room, and the door being open, the testator, who had a view of part of that room from the place where he lay, might have seen them; but there was no evidence that he did so, or that the will was attested in that part of the room which could be seen by the testator: Abbott, C. J. left it to the jury to say whether the will was executed in the testator's presence; and he intimated, that if it were attested in such a situation that the testator might have seen it, the provision of the statute in this respect would be satisfied. Moody & M. 12. In favour of attestation, it is presumed that if the testator might see, he did see. Per Ld. Ellenborough, C. J., 1 M. & S. 294. But where although a will was attested in the room adjoining that in which the testator was and the door of communication was open, yet as it was proved, and the jury found, that the testator at the time was not in fact in a position in which he could have seen the witnesses attest the will, the court held that the will was not duly attested. 1 M. & S. 204.

It is not necessary that all the witnesses should attest the will at the same time, or in the presence of each other; if each of them do so in the presence of the testator, it is sufficient. 2 Atk. 176, n. Therefore if the witness who proves the will at the trial, prove that he attested it in the presence of the testator, the court will presume that the other witnesses attested it in like manner, unless the contrary be shewn on the other side. See Gilb. Ev. 103. If all the witnesses be dead &c., the execution of the will may be proved by evidence of their handwriting, in the same manner as in the case of a deed. 9 Ves. Jun. 381. 2 Str. 1109. Comyns, 531. See ante, p. 418, 372. And where an issue out of Chancery of *devisavit vel non* between A. the heir at law, and B. and others devisees under a will of the ancestor, was tried, and D. one of the attesting witnesses to the will being examined proved the will, and the defendants had a verdict; afterwards an ejectment on the demise of A. was brought against B. alone, to contest the same will, and at the trial (D. being then dead) the defendant gave in evidence an examined copy of the record of the former trial, and tendered proof of what D. stated in his evidence upon that trial; but as it appeared that E., another of the witnesses to the will, was then alive and in court, and the defendant refused to call or examine him, the judge rejected the evidence tendered, and the plaintiff had a verdict: Upon a bill of exceptions to this, the Court of Error held that the evidence given by

D. upon the former trial, was good evidence on the latter trial to prove the same will, and that the defendant was not bound to call B. the other witness; and they held that the issue being between A. and B. and others, and the ejectment between Doe on the demise of A. against B. alone, made no difference. 1 Ad. & E. 3. Where a will was proved by one witness, and the opposite party then gave evidence that the will was originally attested by two witnesses only, but that S. one of those witnesses (since deceased) afterwards procured a female to sign it as a witness, who had not seen it signed: it was holden that the party proving the will might thereupon call witnesses as to the general character of S. 5 Bing. 435. In the same case, the party impugning the will tendered evidence of declarations of the deceased, tending to shew that he had not made a will, and that his heir at law would inherit his property: this evidence was holden not to be admissible. 5 Bing. 435. Where a man devised his real property by will properly executed and attested, and afterwards made several alterations and interlineations in it, and had a fair copy made with the alterations &c. in it, but never signed the latter, nor republished the former; the court held that the first will was not thereby revoked, as the testator had not carried his intention of altering his will into effect by a subsequent will or codicil, and that proof of the first will, as it originally stood, was therefore properly admitted. 2 Brod. & Bing. 650. But where a codicil, properly attested, was added on the same paper on which a will of lands (which was not attested) was written, and plainly referred to it, the attestation of the codicil was holden to extend to the will, and to give effect to it as a good will of lands merely altered by the codicil. 1 Crompt. & M. 42. And the same, if the codicil fairly refer to the will, although it be not written on the same paper, and although the witnesses who attested the codicil never saw the will, or heard the testator acknowledge it further than by the codicil. See 1 Ad. & E. 423. Where, however, the attesting witnesses give evidence at the trial, the devisee is not concluded *by their testimony as to the observance of the above formalities in the attestation. Bul. N. P. 264, the sanity of the testator, at the time, or the like; see 1 W. Bl. 365. 4 Bur. 2224. Skin. 79. 2 Str. 1096; but he may produce evidence, if he will, to contradict their testimony. See Bac. Abr. Wills, D. 3. 1. s. 2. Formerly a legatee or devisee, entitled to any interest under a will, was not a competent witness to prove it, or to give any testimony in support of it; and the will in that case was considered as if it had not been attested by him. 2 Salk. 691. 2 Vern. 317. 1 Vent. 351. Carth. 514. 1 Ld. Raym. 507. 4 Camp. 27. But a devisee who was merely devisee in trust without interest, 1 W. Bl. 365. Gilb. Ev. 120. See 1 P. Wms.

267, or an executor who is not residuary legatee, and has no other beneficial interest under the will, 12 East, 250. 8 D. & R. 69. 6 Taunt. 220. Gibb. Ev. 120. 1 Mod. 107. 1 Doug. 139. 1 W. Bl. 365. 4 Burr. 2254, were and still are good witnesses to prove and support it. And now, by stat. 25 Geo. 2, c. 6, devises or bequests to the witnesses of a will are rendered void, and such witnesses are thereby rendered competent to prove the execution. The devise, however, contemplated by the statute, must be to the witness himself; and therefore where a testator by his will devised an estate in remainder in fee to the wife of one of the attesting witnesses, it was holden that the attestation was void, although the witness died before his wife, and before the estate in remainder came into possession. 5 B. & Ald. 569.

A will, in order to pass freeholds (for copyholds or customary estates are not within the Statute of Frauds, in this respect, 2 W. Bl. 1114. 7 East, 298, 299, 324), must be in writing; it must be signed by the testator (whether with his name or mark, see Freem. 538. Doug. 241. 8 Ves. Jun. 185. 504, or whether on the first or last sheet of the will, 3 Lev. 1. Doug. 241. See 2 Brod. & B. 650, seems to be immaterial), or by some other person in his presence, and by his express directions; and it must be attested and subscribed either with the name or mark of the attesting witnesses, (8 Ves. Jun. 185. 504), in the presence of the divisor (*vide supra*), by three or four credible witnesses. St. 29 C. 2, c. 3, s. 5. And this statute extends not only to devises under the statutes of wills, but also to devises of freeholds by custom. Id.

It is necessary to observe, that wills, like deeds, 30 years old, prove themselves, and it is not necessary to prove them by the attesting witnesses, see 4 B. & Ald. 377, per Cur. even although such witnesses be living, and can be produced. 8 B. & C. 22. And the time here mentioned is reckoned from the date of the will, and not from the death of the testator. 8 B. & C. 22. It is no objection to giving in evidence an ancient will thus without proof, that possession has not followed the will; for it cannot be known how the will directs the possession to go, until it is read; if it appear to come from the proper custody, that is sufficient. 2 Car. & P. 440.

Other written instruments, not under seal.] Writings not under seal are proved in the same manner as deeds: that is, by the *subscribing witness, if there be one; 2 Camp. 94. 1 Stark. 53. 2 Stark. 190; or if not, then by proof of the party's handwriting. Where, in order to prove that a bill of exchange came into the hands of the plaintiff after it had become due, the defendant gave the plaintiff notice to produce a protest of the bill by a prior party, which was in his possession; and upon its being produced, it appeared to be attested by a wit-

ness: Tindal C. J. held, that as the plaintiff claimed no title under the protest, it could not be admitted in evidence, without proof by the attesting witness in the ordinary way. 6 Car. & P. 466. See ante, p. 372. But where in an action on a bill of exchange against the acceptor, the bill when produced appeared to be attested by the defendant's son, and facts were proved from which it might fairly be inferred that he was kept out of the way by his father, Tindal C. J. held this to be a sufficient excuse for not calling the attesting witness. 5 Car. & P. 356, and see ante, p. 372. As to the proof of handwriting, see ante p. 423. It is said also that a writing of this kind, if ancient, shall be received in evidence without proof, in the same manner as an ancient deed. Tr. per Pais, 370. And where the steward of a manor produced the books of the former stewards, to prove receipts of rent by them from entries which appeared to be more than 30 years old, it was contended that although deeds of that age proved themselves, yet it was not so of writings not under seal, and therefore in this case these entries could not be given in evidence, without proof of the handwriting, the persons who made the entries being dead: but the court held that as the books came out of the proper custody, the entries were admissible in evidence; that the rule was not confined to deeds and wills, but extended to letters and other written documents coming from the proper custody. 4 B. & Ald. 376, and see 2 Ad. & E. 171. And where letters of a recent date were found among the papers of a bankrupt, having post marks of a date previous to the act of bankruptcy, these, without further proof, were holden to be evidence against the bankrupt, to prove that he had been apprized of the facts therein stated, though not that the facts so stated were true. Moody & M. 273. If writings not under seal have been lost or destroyed, copies or other secondary evidence of their contents will be received; see ante, p. 372 &c.; but evidence must be given, at the same time, of the genuineness of the original instrument. See Bunb. 189. 1 Atk. 446. To this however there is an exception, already noticed, as to bills of exchange and promissory notes; namely that if a bill of exchange be lost, whilst in a negotiable state, secondary evidence of it will not be received. Ante, p. 373. In order to prove a payment, by a check upon a banker it is not sufficient to produce the check from the custody of the party who drew it, and prove that it was delivered to the party sought to be charged with it, but it must be proved to have been paid. 3 Bing. 431. Where any alteration appears on the face of these instruments, which if made after execution &c. would have the effect of invalidating them, the onus of proving that it was done at a time and under circumstances which would not produce that effect, lies upon the party tendering them in evidence. 5 Bing. 183.

As to the proof of an award, see ante, p. 403. As to secondary evidence of letters, see ante, p. 374. And as to the effect of notice to produce written instruments, see ante, p. 382, 386.

Books of Accounts &c.] Entries in the books of a merchant or tradesman &c., may be used in evidence for the purpose of refreshing the memory of the clerk who made them; see 1 Esp. 1; or the entry may be read in evidence for the master, upon proof of the clerk's death, and proof of his handwriting, 2 Salk. 690. 1 Salk. 285, 2 L. Raym. 873, 6 Mod. 264, where the effect of the entry is to charge the clerk who made it. 2 Esp. 646. 4 T. R. 514, and see 7 East, 270. 10 Id. 109. 15 Id. 32. But proving merely that the clerk is abroad, is not sufficient; 1 Esp. 1, and see Id. 328. Bul. N. P. 282; and even where his death can be proved, this evidence is admissible only within a year after the making of the entry, if the books be those of a "tradesman or handicraftsman," and produced for the purpose of establishing a debt against one of his customers; 7 Jac. 1. c. 12; which however has been holden to extend to entries in a banker's book. 2 Esp. 705. But a tradesman's books or other books of accounts, if produced at a trial, may be good evidence against the owner, Tr. per Pais, 348, and see Hardw. 378. 2 Str. 1130, or between other parties, 10 East, 109, and see 1 Stark. 259. 2 Str. 1128, after the year.

So in all other cases, the entries or statements of a deceased person, whereby he charges himself with the receipt of money, either on the account of third persons, or as having been paid to him on his own account, is evidence of the fact at any distance of time, on the ground that the entry or statement was against his interest at the time he made it. Therefore the private account of a deceased collector of taxes, in which he entered the sums received by him as such, was holden to be good evidence of those receipts, in an action against his surety. 10 B. & C. 317. So accounts of receipts of rent by a deceased executor, as such, has been holden good evidence of a taking of esplees in a writ of right, although the demandant appeared to claim under him. 9 Bing. 697. So in ejectment, where both parties claimed under J. S., entries of the receipt of rents by a deceased steward of J. S., were allowed to be given in evidence by the defendants against the plaintiff, for the purpose of identifying the premises. 2 Ad. & E. 171. And for this purpose, it is immaterial whether the entries be actually in the handwriting of the party, or in that of another person and signed by the party. 6 Car. & P. 130. But a book containing entries by a deceased steward of a manor of the fines assessed, not distinguishing such as had been paid from such as had not, was holden not to be evidence; for as these entries did not show whether any of the fines had been paid, they had not

the effect of charging the person who made them. 7 Bing. 433. So, where the plaintiff, in order to shew that he was tenant of certain premises to one John Brown, proved his payment of the rent for them to Brown during the whole of the time (10 years) that he had occupied them; and the defendant, in order to meet this evidence, tendered in evidence certain accounts in the handwriting of Brown, (who was still alive,) accounting with him as his agent for these rents: but this evidence was holden to be inadmissible, as Brown was alive, and might be produced as a witness. 9 B. & C. 935.

In the case of ecclesiastical dues, it is also every day's practice to admit entries in the books of a parson or vicar as evidence for his successor. 2 Vez. 43. Bumb. 46. They are good evidence also against the successor. See Bumb. 143.

Where the right to the soil was in issue, entries written in a book by the steward of a former owner, from whom title was derived, of receipts of money by the steward for that owner, as a satisfaction for trespasses committed on the place in question, were holden to be admissible evidence, the steward being dead. 4 T. R. 514. See 10 East, 206. 5 T. R. 121. So, an entry of the receipts of money by officers of a township from the officers of another township, as a proportion of church rates made in a parish book, was holden to be evidence to charge the latter officers with the same proportion in future. 4 T. R. 630.

In order to shew the state of a trader's affairs, before his bankruptcy, at the time he made a payment which was sought to be impugned as a fraudulent preference, his banker's ledger was produced at the trial, to prove that he had no balance to his credit there; one clerk alone attended with the book, although the entries were made by several, but it appeared that the book was open to all the clerks in the banking house, as a general book of reference as to the balances to the credit of the different customers of the house: it was objected that the trader's account in this book was not evidence, without calling all the clerks who made the entries in it; but the court held it to be good evidence to prove the negative, that he had no funds there, although it might not be admissible to prove the affirmative. 5 Bing. 114.

Where it was proved to be the invariable practice in the office of a certain attorney, when instructed to serve a tenant with a notice to quit, that a notice and duplicate were written, the one served, and a memorandum indorsed on the other of the fact and time of service by the clerk or person who effected the service; and it appeared that the attorney himself, being instructed by a client to serve notices to quit upon three tenants, made out the notices and duplicates, took them with him for the purpose of serving them, and upon his return wrote the

usual memorandum of service on the back of them; after the death of the attorney, the client, in an ejectment by him against one of these tenants, after proving the above facts, and that the attorney had duly served the other two notices on the day mentioned in the memoranda indorsed upon them, put in the duplicate of the notice to the defendant, and the attorney's indorsement on it, as evidence of the service of the notice: and this was holden to be admissible evidence of the service of the original notice, the indorsement being made by the attorney in the regular discharge of his duty, according to the uniform practice of his office. 3 B. & Ad. 890. and see 1 Stark. R. 404. 3 Camp. 305.

*Where it was sought to effect a defendant with a certain notice, it was proved that the notice was inserted by way of advertisement in the Norfolk Chronicle, which circulated in the city of Norwich, where the defendant lived; but Lord Tenterden, C. J. refused to receive the evidence, without proof also that the defendant was in the habit of taking in that newspaper. Moody & M. 153. and see 1 Stark. R. 186. 3 Bing. 2.

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* CHAPTER III.

PAROL EVIDENCE.

SECT. I.

In what Cases receivable.

PAROL EVIDENCE is inferior to written evidence : and as the general rule is that the best possible evidence shall be given, (see ante, p. 372,) it follows of course that parol evidence can never be received, where there is written evidence of the same fact. And so strict is the rule in this respect, that where an agreement in writing on unstamped paper, was designedly destroyed by one of the parties to it, it was holden that it was not open to the other party to give any evidence whatever of the matter of agreement : parol evidence could not be received of it, because it had been reduced to writing ; nor could parol evidence be received of the contents of the written instrument, as secondary evidence, because if the instrument itself were produced, it could not be received in evidence for want of a stamp. 2 Barn. & Ald. 478. And where parol evidence of the contents of an unstamped agreement, which had been lost, was tendered in evidence, not for the purpose of enforcing the instrument, but merely to prove the value of a tenement mentioned in it, the court held that it could not be received, for the same reason. 3 B. & Ald. 588. But where a parol contract is made subsequently to a written contract, the latter being substituted for the former, parol evidence may of course be given of the latter contract. 12 East, 578. 1 M. & S. 21, but see 4 Bing. 459. So, if the second contract were also a contract in writing, the parties are bound by the terms of the second contract, and not by those of the first : as if there be an agreement in writing for the sale of a ship, and afterwards a bill of sale is executed, the bill of sale is the only contract which is deemed obligatory on the parties. 2 Stark. 105. So, if a contract have been reduced to writing, but not signed by the parties, parol evidence may be given of it. 3 B. & Ald. 326. 2 Adol. & E. 514, and see 2 Brod. & B. 99, and ante, p.

379. *So, where merely the fact of tenancy, and the value of the premises, were to be proved, the court held that these might be proved by parol evidence, although the party held under a written agreement; and that parol evidence of the fact that certain rent was paid, was receivable as proof of the annual value. 7 B. & C. 611. So parol evidence may be given of a partnership, although it be created by deed. 1 Stark. 405. As to the mode of objecting that parol evidence is not the best evidence of any particular fact, see ante, p. 377—379; and as to the cases in which parol evidence may be received as secondary evidence of a written instrument, where the written instrument is proved to have been burnt, destroyed or lost, or in the possession of the opposite party, see ante, p. 379—382.

To prove the defendant's admission of a debt due, the plaintiff produced a book containing a written entry signed by the defendant, but which, being couched in the terms of a promissory note, was rejected for want of a stamp: Held, that a verbal admission of the debt made by the defendant before, or contemporaneously with the entry, was properly received in evidence. *Singleton v. Ballot*, 2 Tyr. 409.

Secondly, As to the admissibility of parol evidence, to contradict, add to, vary or explain a written instrument: in the first place, it is a general rule that parol evidence is not admissible to contradict a record; 1 Re. Abr. 757. See 15 East. 378; or to shew that any particular matter came in question under it, which does not appear upon the face of it: 1 Esp. 42. Parol evidence that a writ was sued out on a day different from that on which it bears date, is indeed admissible, see 2 Bur. 950. Style, 156. 1 W. Bl. 215, 312, and may perhaps be deemed an exception to this rule. If a fine be levied, and no uses declared, parol evidence may be admitted to rebut the presumption that the uses resulted to the co-usur; 1 Doug. 24; which however is no contradiction of the record.

In an action upon a written agreement to procure for the plaintiff (an attorney) "the prosecutions for felony arising in the Town Clerk's Office:" Held, that letters written by the plaintiff previously to the contract, were not evidence to the defendant, to prove that the agreement was intended to include only the prosecutions at the sessions, and not those at the assizes. *Hughes v. Statham*, 4 B. & C. 187.

It is also a general rule, (and was so even before the Statute of Frauds,) that no parol evidence can be admitted to control what appears upon the face of a deed or will &c; not only to avoid the perjuries which the admission of such evidence might give rise to, but from a presumption that whatever the parties had in contemplation at the time was reduced to writing. 5 Co. 68 a, b. 8 Co. 155 a. Keilw. 49. Bac. Abr.

Ev. G. and see 3 Camp. 462. 1 Ld. Raym. 154. 2 Salk. 676. Thus in debt on bond, conditioned for the payment of a sum certain on a certain day, it was holden that the defendant was not at liberty to prove by parol evidence that the bond was given as an indemnity merely. Cowp. 47, see 10 B. & C. 578. 1 M. & Rob. 58. So, in an action on a promissory note, the defendant cannot give in evidence a parol agreement, entered into when it was drawn, that it should be renewed, and that payment should not be demanded when the note became due. 3 Camp. 57. So, in an action on a promissory note payable on demand, it was holden that it was not competent to the defendant to prove that it was given upon the understanding that it was not to be payable until after the death of the drawer; the court saying that it was contrary to the rules of law to admit extrinsic evidence to shew that the intention of a party executing a written instrument, was different from that apparent upon the face of the instrument itself. 3 B. & Ald. 233. So, in an action against the drawer of a note, payable on demand, it was holden to be no defence that the note was given as part of the consideration upon the purchase of premises in the possession of the payee, and that it was stipulated at the time *that the note should not be payable until the payee should have delivered up the premises to the purchaser, which was not done before action brought; the effect of it being to contradict by parol the note itself. 10 B. & C. 729. and see 1 Stark. 361. But although the date of a bill or note, is *prima facie* evidence that it was drawn at that time, see 1 Stark. 175. Moody & M. 486, yet the contrary may be shewn by parol evidence. So a deed may be proved to have been executed on a day different from the date of it. 3 Lev. 348. 4 B. & C. 272. But as to the substance of a deed or other written instrument, the rule is strictly as above stated. It has even been holden that the verbal declarations or warranting of an auctioneer at the time of the sale, are not admissible evidence to contradict the printed conditions. 1 H. Bl. 289. 12 East, 6. 2 Crompt. & J. 411. So where a deed conveying an estate from A. to B. was given in evidence; the court held that parol evidence that A. executed the deed merely for the purpose of giving a colourable estate to B., to serve as a qualification for killing game, was not admissible. 2 B. & Ald. 367. Where A. by his will devised lands to B., and afterwards upon his marriage conveyed them by lease and release to trustees to other uses, with the usual limitations in marriage settlements; the court refused to admit parol evidence to shew that A. meant his will to remain in force, unrevoked by the subsequent conveyance. 2 H. Bl. 516. So, where A. by his will gave £1000 to B., and in case of B.'s death, then to the wife of B.; it was holden that

parol evidence was inadmissible to prove that the testator meant merely to give the interest of the £1000 to B. for his life, and the principal to his wife after his death. 2 Str. 1261. So, where a man made one will in 1752, and another in 1756, without disposing of his personalty, or appointing executors; and by a codicil (reciting that by his *last will, dated in 1752* he had made no disposition of his personalty) he disposed of it, and appointed executors; it was holden that parol evidence was not admissible to shew that the testator intended by the codicil to confirm the will of 1756, and not to republish that of 1752. 6 T. R. 67. So where, upon the assignment of a lease by deed, the deed recited in the usual form that the consideration (59*l.*) had been paid, and a receipt for that amount was indorsed upon it, the court held that the assignor was thereby estopped from proving that the money in fact was not paid, and that the assignee had agreed to do work as a builder for the amount. 3 D. & R. 99. But an ordinary receipt does not conclude the party who has signed it; ante, p. 353; and the same of a bill of lading, which is a receipt for goods, and the captain or owners of the ship may prove that in fact a less quantity of goods were really shipped, than are mentioned in the bill of lading. M. & Rob. 107. Where upon the hearing of an appeal against an order of removal, the respondents, in order to prove a settlement by estate in the parish of A., put in evidence a feoffment, which however described the estate as being in the parish of B., but they offered parol evidence to prove that the estate was in fact in A., and not in B., alleging that as they were not parties to the deed, they were not estopped by this description of the premises in it: *the sessions refused to receive this evidence; but the Court of King's Bench held that the sessions were wrong, and quashed their order. 2 Ad. & E. 517.

The rule we have now been illustrating, however, must be understood to extend to those cases only where the parol evidence is intended to shew that the written instrument has a different effect and operation to that which it purports to have upon the face of it; for where it can be shewn that the instrument is void for usury, or any other illegality (although it appear perfectly legal upon the face of it), or that it has been obtained by fraud, or the like, parol evidence is clearly admissible to prove these circumstances. And therefore where it was proved that a female servant was hired for a year at certain wages under a written contract, but upon her being asked in cross-examination whether she had not also agreed at the time of the hiring to cohabit with her master, the question was objected to, on the ground that no evidence could be received of a consideration that did not appear upon the face of the written instrument; and the sessions being of this opinion, refused to

allow the question to be asked: but the Court of King's Bench held that the question might be asked, in order to ascertain the nature of the contract, and sent the case back to the sessions for that purpose: 1 B. & Adolph. 912. In order to set aside a will for fraud, parol evidence was admitted, of the testator, at the time of executing his will, having asked if the contents were the same as those of a former will, and being answered in the affirmative. 8 T. R. 147. So, evidence may be given that one will was substituted for another. *Id.* So, where a receipt for the price of a horse, drawn up at the instance of the buyer's coachman, contained a warranty of the horse's soundness, and was signed by the seller, who was an illiterate man: the seller was allowed to prove that no warranty in fact was given at the time of sale, and the judge left it to the jury to say whether that was so or not, and whether the warranty had not been foisted into the receipt by an after-thought of the coachman; and the jury being of that opinion, found against the warranty: the court held that the evidence was properly received, and the verdict correct. 7 Bing. 574. So evidence is admissible that a written instrument given in evidence is forged. See 6 East, 195. But no man shall be permitted to set up fraud upon his own part, to defeat his own deed. 2 B. & Ald. 367.

Nor shall parol evidence be admitted, in order to add to, or vary from, the stipulations of a written instrument. Thus where a man devised his estate at Ashton, evidence that he thereby meant not only his estate at Ashton, but also several other estates in other parishes, and that he used to call them collectively his Ashton estate, was holden not to be admissible. 3 Taunt. 147. 4 Dow. 65. See 2 B. & P. 592. So where an agreement that J. S. should have the grass of a close called A., was given in evidence, it was holden that parol evidence was not admissible to shew that this was intended to include the grass of a close called B. also. 3 Wills. 275. So where the defendant held premises under a written agreement for a lease, at a rent of £26 per annum; parol evidence was holden inadmissible to shew that he had also agreed to pay the ground rent, amounting to 2l. 12s. 5d., to the ground landlord. 2 W. Bl. 1249. and see 1 H. Bl. 664. 1 Stark. 267. 3 Camp. 426. So, where the testator devised all his copyhold estates; even documentary evidence that he thereby intended to include also a freehold close which was intermingled with the copyholds, was holden inadmissible. 11 East, 441. But where a testator devised "all that my farm called Trogue's farm," adding, "now in the occupation of A. C.;" parol evidence was admitted to shew that he thereby intended to devise the whole farm, although a part only was in the occupation of A. C. 1 M. & S. 299.

But parol evidence is admissible to explain a latent ambiguity in a written instrument; 6 T. R. 871. 7 T. R. 188. 8 T. R. 379, and see 2 B. & P. 565; that is, an ambiguity not appearing upon the face of the instrument, but arising entirely from extrinsic circumstances. Thus, if a man devise or convey his manor of Dale, and he have two manors of that name; parol evidence is admissible to shew which manor he meant. 2 Rol. Abr. 676, pl. 11. Gilb. Ev. 88. 4 Dow, 65, per Gibbs, C. J. So if a manor or person &c. be named in a record, and there be two of the same name, parol evidence is admissible to shew which was intended. Plowd. 85. b. So, if a man devise to his son John, and he have two sons of that name; parol evidence is admissible to shew which son he meant. 5 Co. 68. 4 Dow. 65, per Gibbs, C. J. So, if a man devise to his right heirs of his mother's side: parol evidence is admissible to shew whether he meant the heir of his mother's mother, or the heir of his mother's father. 2 P. Wms. 185. So where A. by deed conveyed an estate to B., in consideration of his esteem for her, "and for divers other good considerations," Lord Tenterden C. J. allowed parol evidence, to shew that the deed was made in consideration of an intended marriage between A. & B., which afterwards took effect. Moody & M. 472. So, where by a contract between the owners and captains of an India ship, the latter was to receive a certain compensation in lieu of privilege and primage; evidence of a conversation between them previous to the contract, was holden admissible to shew in what sense they intended to use the word "privilege." 1 Stark. 210. So where by a charter-party, the ship-owner engaged to take in certain goods forthwith; evidence was allowed to shew that both parties knew at the time that certain repairs must be made before the ship could take in the goods, in order to prove that by the word "forthwith," they did not mean immediately, but merely as soon as the ship, with due diligence, could have the required repairs completed. Moody & M. 300. So where a promissory note expressed that it was given to the plaintiff, "in consideration of his care and medical attendance," Best, C. J. held that this did not prevent defendant from shewing that the note was given for medicine &c. furnished by the plaintiff as an apothecary, so as to put him to the proof of his certificate as such under stat. 55 G. 3. c. 194. s. 21. Ry. & M. 125. So, where D. and W. trading under the firm of D. & Co., were jointly concerned in an adventure with other persons, of which they undertook the management; D. and W. having insured for account of D. and Co., it was holden a latent ambiguity, to be explained by evidence, whether D. & Co., for whose account the insurance was effected, meant D. and W., or all those who were partners in the adventure. Taunt. 14. Where the consideration was expressed

in a deed to be the sum of £200, "now in hand duly paid by J. B. and Jane his wife," it was holden that parol evidence was admissible to shew that it was all the wife's money, and not the husband's. 7 D. & R. 141. So, where a poor child was put apprentice by the parish officers to one Morgan, and Morgan afterwards, with the assent of two justices, assigned the indenture to one Elias, and the assignment stated that Elias, "in consideration of £3 10s. paid to him by Morgan," agreed to take the apprentice for the residue of the term: it was holden that parol evidence might be given, to shew that the money (£3 10s.) paid to the new master upon the assignment, was in fact the parish money, and not the money of Morgan, the former master. 2 B. & Adolph. 616. So, where by a release, reciting that actions at law were then depending by A. against B., and B. against A., and that it was agreed between them that B. should pay A. £150; and each should execute a release of all actions, &c. to the other; it was stated that in consideration of the £150 paid, and of a release executed by B., A. thereby released to B. all actions and all causes of actions, &c.; afterwards in an action of covenant brought by A. against B. and C., to recover the interest of certain money lent by A., and which B. & C. as overseers of the poor had covenanted to repay; B. pleaded this release in bar, and at the trial A. offered to prove the facts from which the release originated, to shew that they had no connection with or reference to the subject of the action, which evidence was admitted, subject to the opinion of the court: and the court held that it had been rightly received; for the recital restrained the effect of the general words of the release, and confined them to the actions which had been then pending between A. and B., as mentioned and referred to by it. 3 B. & Ad. 175. Where a farm was let from the Lady-day following, by an agreement not under seal, parol evidence, showing that the understanding of the parties was that the tenancy was to commence on old Lady-day, was holden admissible; 3 D. & R. 507; although it would be otherwise if the letting were by deed. 11 East, 812. Where a deed purported to grant all the coal mines under certain lands in the tenure and occupation of widow Kellet and son, and the grantor at the time had no lands in the occupation of persons of that name; the court held that this was a latent ambiguity, and that parol or documentary evidence was admissible to shew what lands were intended by these words. 1 Barn. & Ald. 247. So where a man, having seventeen freehold messuages at Chelsea, devised all his freehold estates to another, but afterwards levied a fine of twelve messuages at Chelsea; Best, C. J. held that evidence might be given to explain as to which twelve of the seventeen houses the fine was intended to be levied. Ry. & M. 68. 1 Car. & P. 284. And the same point was so

ruled afterwards by Lord Tenterden, C. J. 2 Car. & P. 173. So, where "a man devised to his son all his "freehold messuage or tenement, situate in the parish of the Holy Trinity in Cambridge, wherein he now lives," and to his daughter all his "freehold front messuage or tenement in King Street in the said parish, with the appurtenances thereunto belonging, now in the occupation of Edwards;" the houses adjoined each other, and there was a coal cellar within the boundaries of the latter, which the testator during his life-time, and the son since his death, had uniformly occupied with the house devised to the son: held that evidence of this fact might be given to shew that the testator meant that the son should have all that he occupied at the time of the making of the will, including the coal in the cellar in question. 2 Bing. 456. And on the other hand, where a testator devised "all that my farm, lands and hereditaments called Trogue's Farm, situate within the Parish of Darley, in the county of Derby, now in the occupation of A. Clay, unto my brother John Southern," it was holden that evidence was admissible to shew that the testator meant thereby to devise the whole of Trogue's farm, although a part of it was not in the occupation of Clay; the court saying that parcel or no parcel was always a question of evidence for a jury. 1 M. & S. 299. So where an agreement was to convey "all those brickworks in the possession of A. B." it was holden that declarations of the party, at the time of the agreement, might be given in evidence to shew what works were intended. 1 Crompt. & J. 90. So, where a testator devised his manor of Barrow Minchin, the mansion house called Barrow Court thereto belonging, and the park, and all his freehold messuages, lands &c. "thereunto belonging," situate in the parish of Barrow Minchin and Barrow Gurney, to his eldest son for life, remainder to his second son in tail; and in fact there were no messuage or lands, except the mansion house and park, belonging to the manor, the property of the testator, but he had a freehold farm within the parish of Barrow Minchin and Barrow Gurney, which was not parcel of the manor, and which he had purchased a few months before he made his will: the court held that evidence shewing the date of that purchase, the state of the testator's family, his eldest son being otherwise provided for, and other circumstances, was admissible to shew that he intended the devise in question to pass the farm recently purchased, and of which there could have been no doubt, if it were not for the mistake of introducing the words "thereunto belonging" as above mentioned. 2 B. & Adolph. 680. So, if a devise be to A. by name, but with a description annexed which was applicable neither to A. nor to any other person, the description may be rejected as surplusage, and then A. will take under the devise. 6 T. R. 671. 4 Dow. 65. per Gibbs, C. J.

So, if the devisor gave instructions to his attorney to insert the name of A., and the attorney by mistake insert the name of B., parol evidence of this fact will be admitted; 6 T. R. 671. 2 P. Wms. 141: but parol evidence of declarations of the testator previously to the making of the will cannot be received. *Id.* So in the case of written contract, parol evidence may be admitted to shew whether the party made it on his own account, or merely as agent for another. See 7 Taunt. 295. So, *where a person was entitled to certain premises, out of which his daughter was entitled to a certain annuity, and an agreement for granting a lease of the premises was signed by his son, expressly as agent for his sister: it was holden by Best, C. J. that parol evidence was admissible to prove that the son signed the agreement as agent for his father, and not for his sister. 1 Car. & P. 589. But where a testator devised all his estates in the county of Limerick, and in the city of Limerick, to certain trustees; and he had a small estate in the city of Limerick, which it was admitted passed by the will, but he had none in the county of Limerick; he had however estates in the county of Clare, and in the draft of the will, submitted to and approved by the testator, the devise was of his estates in the counties of Clare, Limerick, and in the city of Limerick, but a conveyancer, to whom the will was submitted, by mistake, and without authority or instructions, struck out the county of Clare, and the testator executed the will without noticing the alteration: the question was, whether parol evidence of these facts, and that the estate in the city of Limerick was wholly insufficient to answer the trusts of the will, could be admitted, to shew that the intention of the testator was to pass by his will the estates in the county of Clare: the Lord Chancellor, and the Chief Justice of the Common Pleas and Chief Baron of the Exchequer, whom he had called on to assist him, held that the evidence was not admissible, as the effect of it would be, not to explain an ambiguity, but to make the testator devise estates which were not mentioned at all in the will. 8 Bing. 244. Where a devise is to A. by name, with a description annexed, applicable not to A. but to B., neither shall take, an account of the uncertainty, but the estate shall go to the heir-at-law; and parol evidence is not admissible to shew that the devisor meant to leave the premises to A. *Id.* But where a devise was to George Huthwaite, the eldest son of John Huthwaite, of Nottingham, for life, remainder to his issue, remainder to Stokeham Huthwaite, second son of the said John Huthwaite, for life, remainder to his issue, remainder to John Huthwaite, third son of the said John Huthwaite, &c.; John was in fact the second son, and Stokeham the third, so that it was evident the testator mistook either the name or the description of the party who

was first to take under his will, in case of George the Eldest son dying without issue; the Court of King's Bench, upon error from the Common Pleas (see 8 Taunt. 306), held, that evidence of the state of the testator's family, and other circumstances, was admissible, to shew whether the testator had made a mistake in the name or not; if such evidence were given, the jury might judge of it, and decide accordingly; but if no such evidence was given, then it would be a mere question of law, as to the intention of the testator, to be collected from the will itself. 3 B. & Ald. 632. Where a devise was "unto Matthew Westlake my brother, and to Simon Westlake my brother's son," of certain premises; it appeared that the testator had in fact three brothers, each of whom had a son named Simon; and evidence was tendered and received, of declarations by the testator that he intended to devise the property to *Simon the son of his brother Richard, and not Simon the son of his brother Mathew: but the court held that the evidence ought not to have been received; for the fact of the testator having three brothers, each of whom had a son Simon, raised in this case no ambiguity whatever, as the words "my brother's son," from the manner in which they were used in the will, must necessarily mean, in legal construction, the son of that brother who was immediately before mentioned, and who was thus particularly in the testator's mind. 4 B. & Ald. 57.

As to mercantile contracts, they may be explained by parol evidence of the usage of the particular trade. Where a question arose as to the meaning of the words "bales of cotton," in a charter-party upon a voyage from Alexandria to Liverpool, and for one party it was proved that in the cotton trade, when cotton is merely put into a bag, it is called a bag of cotton; but when it is compressed into a cubical form, so as to take up less room, it is then called a bale of cotton: by the other party, it was admitted that such was the case, with respect to cotton brought from Calcutta; but as to cotton from Alexandria, where they had not any mode of compressing it, the term bale or bag was indiscriminately used, as meaning the same thing; and in confirmation of this, the bill of lading of the cotton in question was put in evidence, where the expression was 1400 "bales" of cotton, although they were in fact not compressed; the broker also gave evidence of conversation that passed between the parties at the time of entering into the charter-party: Abbott, C. J. thought that the broker's account of what passed at the time of making the contract, was too dangerous evidence to be relied upon in a case of this kind, but left it to the jury to say what was meant by the word "bale," saying that if it had a particular meaning in the trade between Alexandria and Liverpool, it must govern this case,

but he would expect it to be strictly proved ; the jury, who were special, found that the term " bale of cotton " meant a compressed bale. 2 Car. & P. 525. So, where in a letter from St. Domingo, it was stated that a ship would sail in October, Lord Kenyon, C. J. allowed parol evidence that this, among commercial men, was well understood to mean that the ship would sail some time after the 25th October and before the 1st or 2d November. Peake, R. 61. But no usage shall be allowed to add to or control such contracts. Therefore in an action on a warranty of bacon, that it was prime singed bacon, the court held that the defendant could not be admitted to give in evidence an usage in the bacon trade to receive bacon, to a certain degree tainted, as prime singed bacon ; or that the purchaser should be precluded from remedy, if he did not point out the defect by an early day. 6 Taunt. 446. Holt, 95. So where a contract is made for the sale of goods, without mention of the time they are to be taken away ; parol evidence is not admissible to shew that by the usage of the trade the goods must be taken away immediately, unless it be otherwise stipulated in the contract. 3 Camp. 426. So where a policy of insurance was " on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely *landed," evidence that by an usage in such cases, the risk on the goods as well as on the ship ceased at the expiration of twenty-four hours, was holden to be inadmissible. Parke, Ins. 416. But where by an agreement for the charter of a vessel, the owners contracted " forthwith " to take in certain goods, Lord Tenterden, C. J. allowed evidence to be given that both parties at the time knew that the ship wanted some necessary repairs, which must have been done before she could take in the goods ; and his lordship under these circumstances held that the parties must have meant by the word " forthwith," that the vessel should be got ready without delay and with reasonable and proper diligence, and he put it to the jury whether the owners had done so. Moody & M. 300. So, where a bought and sold note stated a sale of " about 300 quarters (more or less) of foreign rye, shipped on board the Anna Elizabeth at Hambro, and also " about 50 quarters " of foreign red wheat, per same vessel ; in fact the vessel brought 345 quarters of rye and 91 of wheat, and the buyer offered to take the 300 quarters of rye and 50 of wheat, but the seller refused to deliver less than the whole ; in an action by the buyer against the seller, he proved in evidence that in the corn trade, where the words " more or less " are used in a contract, it is contrary to the custom of merchants to require the purchaser to accept so large an excess over the quantity specified, as was required to be taken upon this occasion ; this evidence was objected to, but received, and a verdict was found for the plaintiff, with leave to the defendant to

move to enter a nonsuit: such motion being made, the court held it to be immaterial whether the evidence was properly received or not; if properly received, the verdict was right; if improperly received, then the court had to put a construction on those words, and they were of opinion that the excess of the quantity was greater than the terms of the contract warranted. 2 B. & Adolph. 106. So a clerk in a merchant's counting house may be called as a witness to prove the meaning of a particular entry in the books of the office, made by a fellow clerk since deceased. 3 Car. & P. 532.

So the custom of the place where the parties to a contract reside, may be given in evidence to explain the meaning of particular expressions in it. Thus, for instance, if premises be let by parol from Lady-Day, evidence of the custom of the country may be given, to shew that the parties meant that the tenancy was to commence from Old Lady-Day; 4 B. & Ald. 588. 1 Esp. 198, and see 3 D. & R. 507; but if the letting were by deed, it would be otherwise. 11 East, 312. So, where in a lease of a rabbit warren, the lessee covenanted that at the expiration of the lease he would leave 10,000 rabbits in the warren, the lessor paying 60*l.* per-thousand for them; in an action afterwards brought by the lessee against the lessor, to recover the value of the rabbits left, the lessor was allowed to prove, that by the custom of the country a thousand rabbits consisted of 1200: and the court held that this evidence was properly received; Lord Tenterden, C. J. saying that it must be supposed that the term "thousand" was used by the parties in the sense in which it was usually understood in the place where the contract was made, when applied to the subject of rabbits, and parol evidence was admissible to shew what that sense was. 3 B. & Adolph. 728.

Evidence of a constant usage, is also admitted in order to explain general terms in ancient grants. 1 Esp. 322. 1 Camp. 22. 190. 2 Brod. & B. 403.

What we have now been treating of, are latent ambiguities. But patent ambiguities, or those which are apparent upon the face of the instrument, cannot be explained by parol evidence. As, for instance, where the name of the devisee is omitted in a will, parol evidence is not admissible to shew to whom the testator meant to leave his property. 3 Atk. 257. But where a blank was left for the christian name only, such evidence has been admitted. 3 Ves. 148. 4 Ves. 680.

Thirdly, it is a general rule that parol evidence shall not be received of any thing which is not immediately within the knowledge of the witness; he must speak of facts which happened in his presence or within his hearing. To this however there are one or two exceptions. In a matter of science, a person intimately acquainted with it, may be

called upon to give his opinion as to the probable result or consequence from certain facts already proved. As, for instance, if it were required to determine whether a man died of any particular disease; symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the party died, as founded upon the symptoms so proved, although he had never seen the deceased. So, when a question arises as to the sea-worthiness of a ship, after evidence has been given of her condition, experienced shipwrights may be called to say whether, upon the facts sworn to, she was in their opinion sea-worthy or not, although they may have never seen her. 1 Camp. 117. It was formerly holden, that a person conversant in the business of insurance, might be called upon in evidence to say, as a matter of judgment, whether the communication of certain facts would not have been material to the underwriter, and whether such communication would not have enhanced the premium; 2 Stark. 258. 10 B. & C. 527; but this has since been overruled. 5 B. & Adol. 840. and see 3 Burr. 1905, 1913, 1914. Holt. 283. But in an action against an insurance broker, for negligence and want of skill in procuring a policy of insurance to be altered, it was holden that the defendant might call other brokers as witnesses, to prove that a skilful insurance broker, in their judgment, would have procured the policy to be altered in the same way upon the same instructions. 10 Bing. 57. So in an action against the owners of a ship, by a passenger, for injury sustained by him through the negligence of the second mate, &c., Abbott, C. J. held that the plaintiff might call as a witness a person experienced in nautical affairs, state to him what had been done, and ask him if an officer of competent skill would have done so. 1 Car. & P. 70. Where a physician brought an action for a libel, imputing to him the having prescribed improper medicines to a child, the plaintiff in order to prove that the medicines were proper, and the doses such as were usually ordered by the profession, tendered in evidence medical books of authority upon the *subject; but Tindal C. J. held that such evidence could not be received; but he said that he might call medical men of competent skill, and ask them their opinion upon the subject, and might even question them as to the grounds of their opinion. 5 Car. & P. 73. But where in an action by a physician for a libel, stating that Dr. T., another medical man, had refused to act with him on account of something done by him, and that Dr. T., by doing so, had honourably and faithfully discharged his duty to his medical brethren, and it was hoped every other medical man would do the same; the defendant, who had justified, proposed to call an eminent physician as a witness, and to ask him if he would meet the plaintiff in consultation, and if Dr. T., by refusing to

act with the plaintiff, had not honourably and faithfully discharged his duty to the medical profession: but Tindal, C. J. refused to allow him to do so, and the court afterwards held the evidence to be inadmissible. 9 Bing. 333.

Hearsay evidence is also an exception to the above rule, in some instances. The general rule undoubtedly is, that hearsay is no evidence, and for two reasons: what the other person said, was not upon oath; and the party who is to be affected by it, had no opportunity of cross-examining him. Gilb. Ev. 149. But in questions of legitimacy, and in questions of pedigree, in the absence of positive proof, the declarations of persons who are since dead are admissible in evidence. Bul. N. P. 294. and see 3 T. R. 707. Cowp. 591. The declarations however must be those of members of the family; the declarations of mere acquaintances, however intimate, or of servants, are not admissible; 2 Bing. 86. 13 Ves., Jun. 514, 147; even the dying declarations of a servant are not admissible. 4 B. & Ald. 53. But the husband of a female relation is deemed one of the family, for this purpose, and his declarations are evidence. Ry. & M. 297. These declarations, also, to be evidence, must have been *ante litem motam*: for if otherwise, they are inadmissible. Per Wood B. Berkeley Peerage Case. 4 Camp. 406. and see post, p. 469. But if made *ante litem motam*, it is no objection that the party who made them was at the time interested as to the matter of the declarations. Ry. & M. 141. cor. Abbott, C. J. So, hearsay is admissible evidence to prove the death of a person beyond sea. Bul. N. P. 294. 15 East, 293. So, the declarations of tenants, are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof, in addition, that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. 2 T. R. 53. and see 14 East, 332. 2 M. & S. 49. 1 M. & S. 77, 679. but see 14 East, 323. So where the plaintiff claimed as devisee is remainder under a will made twenty-seven years before, under which there was no possession; declarations by the tenant who was in possession at the time, that he held as tenant to the devisor, were holden to be admissible evidence to prove seisin in the devisor. 2 T. R. 55. See Bul. N. P. 295. 1 Wils. 215. So upon an issue between A. and B. whether C. died possessed of certain property, it was holden that declarations by C. that she had assigned the property to A., *were admissible evidence. 1 Taunt. 141. So, in questions of prescription, hearsay is good evidence to prove a general reputation in the neighbourhood upon the subject. Bul. N. P. 295. See 3 T. R. 707. but see 14 East, 327. n. And the declarations in these cases, like those

in the case of pedigree, must appear to have been made *ante litem motam*. 3 Camp. 444. See 4 M. & S. 486. So, general evidence of reputation, is admissible to prove a particular custom; 14 East, 327. n; such as the custom of a manor, that in default of sons the eldest daughter should take, and in default of daughters the eldest sister, 12 East, 62, or the like. So, general reputation that a man and woman, living together, are husband and wife, is good evidence of the marriage in an action by their heir, even although the father and mother be living, and might be examined as witnesses. 4 Bing. 266. But general reputation is no evidence whatever of the ownership of property; 14 East, 323; even though coupled with other evidence. *Id.* But proof of undisputed acts of ownership exercised by a party over property, is admissible evidence, as raising a presumption of a grant or reservation formerly made, corresponding in extent with the rights exercised; so, proof of a forbearance to interfere with such acts of ownership, by parties whose interest it was to interfere, if they had a right to do so, is admissible evidence to prove the right; 14 East, 332, and see ante, p. 366; and the declarations of such persons accompanying such acts of forbearance, and explaining the reason of them, are also admissible in evidence. *Id.* And where an entire district is holden under one title, proof of acts of ownership in different parts of it, is admissible as evidence of the same right throughout the whole. *Id.* & 7 Bing. 332. Therefore where the owner of a large estate, surrounded by a ring fence, claimed the trees growing in a belt of fifteen feet wide round the fence, although he did not claim the land on which they grew, evidence of acts of undisputed ownership exercised by him and his ancestors in cutting down &c. the trees growing in the belt, and instances of the forbearance of the owners of the land of the belt to cut down the trees, was holden to be evidence of the right claimed, as being presumptive evidence either of a grant to the party or his ancestors, by the owners of the land of the belt, of the trees there growing or thereafter to grow in it, or of a grant by such party or his ancestor of the land of the belt, reserving to himself the trees. 14 East, 332. And although the dispute in that case respected the trees growing in a small portion of the belt, it was holden that evidence of such acts of ownership in all the other parts of it, was equally admissible, as evidence of such acts in the part in question. *Id.* So where the lord of a manor claimed a piece of land lying between old inclosures and the road, it was holden that he might support his claim by evidence of acts of ownership, not only in the place in question, but in other strips of uninclosed land on the road side within the manor. 7 Bing. 332. So, what a witness (since dead) swore at a former trial between the same parties, may be

given in evidence, either by reading it from the judge's notes, or by proving it by the parol testimony of any person who heard it. 3 Taunt. 262, and see ante, 392. Also, what a witness has been heard to say at another time, may be given in evidence, in order to invalidate or confirm the testimony he gives in court. 2 Hawk. c. 46. s. 14. Gilb. Ev. 150. In cases where hearsay is receivable as evidence in questions of pedigree and the like, a special verdict in an action between other parties, Bul. N. P. 233, ancient deeds and papers, the custody of which is satisfactorily accounted for, see 11 East, 504. 5 T. R. 412. n. and ante, p. 414, 415, an entry by the father or other relation in the family bible or in any other book or paper, ante, p. 411, 412, an inscription on a tomb-stone, &c. or the like, are also admissible evidence for the same purposes.

It may be necessary to add, that in civil actions, the single testimony of one credible witness is sufficient to prove any fact; see Carth. 144, per Holt; although the rule is otherwise, in some few instances, in criminal cases.

SECT. II.

Incompetency of Witnesses.

Persons deemed incompetent as witnesses, and who therefore will not be allowed to give evidence in a civil action, may be classed as follows: those who do not appear to have sufficient discretion; those who do not appear to have a right sense of the sanctity and moral obligation of an oath; those whose crimes have rendered them infamous; those who are interested in the event of the suit; those who stand in the relation of husband or wife to either party; and lastly, the counsel and solicitors of the parties, in some instances.

From want of discretion.] An idiot shall not be allowed to give evidence; Co. Lit. 6 b. Gilb. Ev. 144; nor a lunatic, Co. Lit. 6 b. Gilb. Ev. 144, unless during a lucid interval; Com. Dig. Testm. A 1; nor a person who is deaf, dumb and blind. But a person who is deaf and dumb, merely, is not incompetent; and he may be examined through the medium of a sworn interpreter, who understands his signs; *Rex v. Pollock*, MS. 1814; or the questions may be put, and his answers given in writing. 3 Car. & P. 127. So, an infant of any age may be a witness, even in criminal cases, provided such infant appear sufficiently to understand the nature and moral obligation of an oath. Leach, 180. 104. See 2 Hale, 278. 284. Com. Dig. Testm. A. 1. 2 Str. 700. Gilb. Ev. 144.

From want of Religion.] It is not necessary that a witness should be a Christian, or even believe in the Old Testament, as laid down in some of the older authorities; see Co. Lit. 6 b. Gilb. Ev. 142, 143; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. Willes, 538. 1 Atk. 19. 21. 1 Wils. 84. Bul. N. P. 292. Peake, 14. Thus, Christians of all sects and denominations, see Leach, 319. Peake, 14. 33. 211, Jews, Gilb. Ev. 143. 2 Str. 821, Turks, Moors and other Mosliminn, see 2 Str. 1104, Gentoos, Willes, 538. 1 Atk. 19. 21, 1 Wils. 84, and the *like, may be witnesses. But a man wholly without religion, and having no belief in the moral obligation of an oath, shall not be received to give evidence in any case whatever. 1 Atk. 44. Bul. N. P. 292.

From Infamy.] Persons convicted of treason, felony, piracy *præsumere*, perjury, forgery on statute 5 El. c. 14, 2 Hawk. c. 46. s. 19. Gilb. Ev. 139. 2 Ro. Abr. 686. Co. Lit. 6, or any other species of the *crimen falsi*, such as conspiracy, barrety and the like, 1 Leach, 349. 2 Salk. 690, shall not be allowed to give evidence. The conspiracy here mentioned, means seemingly such conspiracy only as the old writ of conspiracy would lie for, namely, a conspiracy falsely to indict a man who is afterwards acquitted, or to prevent or obstruct the course of justice or the like, and not such offences as are usually made the subject of the modern indictment for conspiracy. Therefore Sir William Scott after great consideration, determined that a conviction of a conspiracy to commit a fraud, did not render an affidavit of the convict inadmissible. 2 Dods. R. 174. So, a conviction upon an indictment for a conspiracy to raise the price of the public funds, by spreading false rumours concerning them, was holden not to render a witness incompetent. 3 Stark. R. 21. But in a case where it appeared that the witness was convicted of a conspiracy to obstruct the course of justice, by bribing a witness not to appear upon a trial, Gaselee, J., after consulting with Littledale, J. held that he was not a competent witness. Ry. & M. 434, but see 9 G. 4. c. 32. s. 4. post. Formerly, it was the general opinion that standing in the pillory for any offence, or undergoing any other species of infamous corporal punishment, incapacitated a man from being a witness; 2 Hawk. c. 46. s. 19. Co. Lit. 6 b. 5 Mod. 74. 2 Salk. 461. 689; but it is now settled that it is the infamy of the crime, and not the nature or mode of the punishment, that destroys the competency; 2 Wils. 18. Gilb. Ev. 140; and therefore if a man have stood in the pillory for a libel, or for seditious words, or the like, he is not thereby disabled from being a witness. Gilb. Ev. 140, 141. R. 3 Lev. 426. When it was objected to the competency of a witness, that he

had been convicted of keeping a public gaming house, Abbott, C. J. said that no authority being shewn to prove that he was incompetent on that account, he thought himself bound to receive his evidence. Ry. & M. 270. and see 9 G. 4. c. 32. s. 4. *infra*. So, outlawry in a civil suit does not render a man incompetent as a witness; Co. Lit. 6 b. 2 Hawk. c. 46. s. 21; nor does a conviction of petit larceny; 31 Geo. 3. c. 35; nor has the mere commission of any offence that effect, unless the party have been actually convicted of it. Kelyng. 17, 18. 1 Sid. 51. Cowp. 3. See 11 East, 309.

But a pardon of any of these offences has the effect of restoring competency, in as full a manner as if the witness had never been convicted; 2 Hawk. c. 46. s. 22. Gilb. Ev. 141, 142; and this, even in the case of perjury at common law. 5 Esp. 94. There are two exceptions, however, to this: namely, perjury on the statute 5 El. c. 9, and such conspiracy at the suit of the king, as is above *mentioned; in which case the incompetency forms a part of the judgment, and is not merely a consequence of it. 2 Hawk. c. 46. s. 22. See 9 G. 4. c. 32. s. 4. *infra*.

Also formerly burning in the hand for felony, (being *quasi* a statute pardon,) T. Raym. 369. 380. Kelyng. 37. Style, 388, and the punishment afterwards substituted for it by stat. 19 Geo. 3. c. 74. s. 3. had the same effect in restoring competency as an actual pardon. And proof of the record, wherein it appeared that clergy was granted to the party, was sufficient, without proving that he was burnt in the hand. Per Trevor, 7 Ann. See Com. Dig. Testm. A. 4, but see 5 St. Tr. 166. Kelyng. 93. But the burning in the hand, the punishment substituted for it, and indeed the benefit of clergy altogether, have been abolished by stat. 7 & 8 G. 4. c. 28. s. 6. And now, by stat. 9 G. 4. c. 82. s. 3, when any offender, convicted of a felony not punishable with death, shall have endured the punishment adjudged for it, the punishment so endured shall have the like effect and consequences as a pardon under the great seal of the felony of which he was so convicted. And by sect. 4, reciting that there are certain misdemeanors which render the parties convicted thereof incompetent witnesses, it is enacted that where any offender hath been or shall be convicted of any such misdemeanor (except perjury or subornation of perjury,) and shall have endured the punishment adjudged for the same, he shall not, after the punishment so endured, be deemed to be, by reason of such misdemeanor, an incompetent witness in any court or proceeding, civil or criminal.

The only mode of objecting to the competency of a person convicted, is by proving the record of his conviction; Bul. N. P. 292; even the admission of the witness that he has been convicted, is not sufficient.

8 East, 77. And it must appear that he received judgment ; for merely being found guilty of the offence, is not sufficient. T. Raym. 32. 2 Sid. 51. Gilb. Ev. 142, and see Cowp. 3. 2 Stark. 183.

It may be necessary to mention, that you cannot ask a witness in cross-examination a question, the answer to which in the affirmative would amount to an admission that he had committed some offence for which he might be subject to punishment. 2 Hawk. c. 46. s. 20. 1 Moody & M. 108. 3 Taunt. 424. 1 Car. & P. 85, and see 46 G. 3, c. 37. As to questions, the answers to which merely go to degrade a witness, but not to subject him to punishment, they may not only be asked, but must be answered. 1 Moody & M. 108. 4 T. R. 440. 2 Stark. R. 241.

From Interest.] It is a general rule of evidence, not to admit the testimony of a witness, who is to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. Co. Lit. 6. Gilb. Ev. 119, and see 1 Sid. 237. 2 Atk. 615. Hardw. 358. 4 Bur. 2251. 3 T. R. 27. 7 T. R. 62. This rule is obviously applicable to the parties in the suit ; but as there are some peculiar qualifications of it, and exceptions to it, in this respect, it is thought better to class the authorities relative to parties under a distinct head. Vide post, p. 470.

*Where evidence was required to ascertain the boundaries of a parish, the testimony of the parson was rejected, because he was evidently interested, the amount of the tithes being in proportion to the extent of the parish. 7 Mod. 63. So, the testimony of a vendor, shall not be received to support or prove the title of his vendee, if the feoffment &c. contain a covenant for title or warranty. Gilb. Ev. 123: 130. 2 Ro. Abr. 685. See 2 Sid. 51. 1 Keb. 134. T. Raym. 32. Style, 482. 1 Str. 445. 2 New Rep. 31. On an issue to try whether the inhabitants of A. were immemorially bound to repair a chapel, it was holden that the owner of the inheritance was not a competent witness to negative the liability ; although he had leased his property for years, at a rent certain, and the rate was payable by his tenants and not by him ; and although he lived in another county, and was not upon the rate himself: for he still had an interest in discharging the inheritance from a permanent burthen. 1 B. & Ald. 87. 2 Stark. 215. 1 Holt, 619. So, where a tenant claiming a right of common over a piece of waste land, brings an action against the owner of the adjoining close for not repairing an intervening fence ; the landlord, under whom the plaintiff holds the premises in respect of which he claims the right of common, is not a competent witness to prove the right ; 1 Camp. 260 ; nor would other persons, who have a similar right of common, be com-

petent witnesses for that purpose, Id. 1 Taunt. 261. Skin. 174. and see 1 Str. 658. 2 Esp. 679. And the same of other rights. See 5 Bing. 171. So, a person who has acted in breach of an alleged custom, is not a competent witness to disprove the existence of the custom. 1 Doug. 374. But if A. and B. claim a right of common in a certain place, exclusively of all other persons, and the right of A. be disputed B. may be a witness for A.; for his testimony tends to narrow his own right, not to support it. 1 L. Raym. 731. per Holt. Or if common be claimed by prescription in right of a particular estate, another commoner who has common in right of another estate is a competent witness; 1 T. R. 302. per Buller; for their rights are different, and the evidence to maintain the one, does not support the other. Or, when the question is as to the right in the land itself, a person claiming common in it *par cause de vicinage* is a competent witness; for his right of common is not affected by the event of the suit. Gilb. Ev. 122. So where in covenant for rent upon a lease from B. to D., the point in issue was whether A. (the head landlord, and whose title both admitted) demised first to B. or to another person, C.: A. was holden to be a competent witness to prove the point in issue; for the verdict could not be given in evidence in any action which should afterwards be brought either by or against him. 3 T. R. 308. But if, in ejectment, two persons, who are to pay rent in different rights, be contending for the possession, the landlord is not a competent witness to prove the demise, 3 T. R. 308. per Buller, unless he have parted with the reversion. Peake, R. 101. The tenant also is not a competent witness to prove the title or estate of his landlord, for he would thereby be upholding his own possession; Cowp. 621. and see 1 Str. 632. 5 Taunt. 185. 1 Marsh. 7. 1 Camp. 341; except perhaps in the case of a tenant at will, whose interest in the land *may be deemed two trifling and precarious, to affect his testimony, Gilb. Ev. 121. And in an action on the case by the reversioner, for an injury done to his reversionary interest in premises, the tenant in possession is a good witness for him; for he cannot benefit by the verdict. 1 Bing. 257. But where A. is tenant in tail, remainder to B. in tail; in an action by a third person, B. cannot be a witness for A. to prove the title to the lands; for although his title is precarious, and liable to be destroyed by A.'s suffering a recovery, yet an estate, such as it is, is actually vested in him. 1 Salk. 283. 2 L. Raym. 724. 6 Bing. 390. Bac. Abr. Ev. B. So, where a witness called by the lessor of plaintiff in ejectment, admitted in cross-examination that the lessor had made an assignment of the premises in question twenty-four years before, for the purpose of affording him a protection from impressment, but that he had since given up the deed to him: Best, C. J. held that the

witness had still an interest in the premises, which he might make available in the event of a verdict for the plaintiff; and that therefore he was an incompetent witness. Ry. & M. 87. Where a landlord distrained upon the goods of an under-tenant, it was holden, in replevin that the tenant was not a competent witness for the landlord; 1 Bing. 210; but the Court of King's Bench have since decided seemingly otherwise. 2 Ad. & E. 333. In ejectment, the defendant called a witness to prove that she was in possession of the premises forty years by the permission of the defendant and his father; but Bosanquet, J. held the witness to be incompetent, because if the plaintiff recovered, she would be liable for mesne profits. 4 Car. & P. 556. In an action against the sheriff for a false return to a *fi. fa.*, which return stated that he had paid money to the landlord of the premises for arrears of rent, the landlord was holden to be an incompetent witness to prove that the rent was due; for if it were not, he would be liable over to the sheriff, and the record in the present action would be evidence against him. 3 Camp. 521. and see 3 Car. & P. 169. Where goods were furnished to A. at the request and on the credit of B.; in an action against B. for the price of the goods, it was holden that A. was not a competent witness for the plaintiff; for A. was *prima facie* liable for the goods, and therefore had a direct interest in fixing that liability upon the defendant. 2 Camp. 200. So where A. employs B. to do certain repairs to his house, and B. employs C. to do them, in an action by C. against B. for the amount, A. is not a competent witness to prove that he employed C.; Peake, R. 134; but he would be, for the purpose merely of proving that the work was done by C. 1 Car. & P. 76.

Bail are incompetent witnesses for their principal, in the action against him; for they are directly interested in the event of the suit. 1 T. R. 163. 2 Hawk. c. 46. s. 24. See 1 Str. 406. Hardw. 133. and see 4 Car. & P. 148. So are the wives of the bail, for the same reason. 8 D. & R. 65. But bail may be rendered competent witnesses at the trial, by depositing the sum sworn to, and a sum sufficient to answer the plaintiff's costs of the action, with the officer of the court; and the judge will thereupon order his name to be struck off the bail-piece. Moody & M. 289. Sureties in a *replevin bond, are also incompetent as witnesses for the plaintiff in replevin, being directly interested in the event of the suit. See 1 Bing. 92. So for the same reason, if A. gives B. an indemnity against the costs &c. in a particular action, A. is incompetent as a witness for B. in that action, 1 Str. 575. and see Hardw. 202. 1 H. Bl. 303. And where A. let a house to B., and B. underlet to C., and upon B.'s becoming bankrupt his assignees consented to A. bringing an action in B.'s name against C. for the amount of the

rent; A however died, but his executor desired the attorney to proceed in the action: Lord Tenterden C. J. held that the executor was thereby rendered incompetent as a witness for the plaintiff; 3 Car. & P. 38; and the witness in such a case cannot be rendered competent, without a release from the attorney, 6 Car. & P. 181, or a rescinding of the agreement &c. by which he has become liable. 1 Car. & P. 78. So, if a man promise, in the event of his succeeding in a suit for lands, to give another a lease of them for years, the latter is incompetent to give testimony at the trial. Gilb. Ev. 122. See 1 Mod. 21. 2 Keb. 576. But it has been holden in trover, that the real owner of the goods is a competent witness on the part of the defendant to prove that fact; for the verdict cannot be evidence for or against him. 4 B. & Ald. 410. So in an action for work and labour, the person actually employed to do the work is a competent witness for the defendant. 2 Car. & P. 467. and see 1 Id. 17. So, formerly a legatee or devisee was holden to be an incompetent witness to prove the will, or to give any other testimony in support of it. 2 Salk. 691. 2 Vern. 317. 1 Vent. 851. Carth. 514. 1 L. Raym. 507. 4 Camp. 27. The objection, however, as far as relates to the witnesses to a will, is now removed by stat. 25 Geo. 2, c. 6, by which devises or bequests to the witnesses of a will are rendered void, and such witnesses thereby rendered competent to prove the execution; but the objection still remains as to other devisees or legatees. In an action by an executor, the residuary legatee is an incompetent witness, also, for the same reason. See 4 Camp. 27. But a legatee who has been paid, is competent to give evidence for the executor, to increase the estate, if it do not appear that the estate, independently of the cause of action, would be insufficient. Ry. & M. 81. So in an action against an executor, for mourning for the deceased's family, Best, C. J. held that a legatee, though unpaid, was a competent witness for the defendant, for the mourning was not any part of the funeral expenses, with which the executor could legally charge the estate. 2 Car. & P. 207. So a devisee, who is merely a devisee in trust, without interest, 1 W. Bl. 365. Gilb. Ev. 120. see 1 P. Wms. 287, or an executor, who is not residuary legatee, and has no other beneficial interest under the will, 12 East, 250. 6 Taunt. 220. Gilb. Ev. 120. 1 Mod. 107. 1 Doug. 139. 1 W. Bl. 365. 4 Bur. 2254, is a good witness to prove or support it. And in an action respecting land devised, and executor who even took a pecuniary interest under the will, was holden to be a competent witness to support the will; because the verdict in that case could only have the effect of establishing the will as to the real property, but would be no evidence *in the ecclesiastical

tical court, if its validity with respect to the personalty were questioned. 5 B. & C. 335.

In an action by an executor or administrator, if the estate of the testator or intestate be insolvent, a person who has an unsatisfied demand upon it is not a competent witness for the plaintiff; 1 Camp. 381. and see 3 Car. & P. 107; but in an action against an administrator, upon *plene administravit* pleaded, a creditor of the deceased may be a witness for the defendant. Moody & M. 345. A creditor of a bankrupt is an incompetent witness to support the commission, Hardw. 267. 3 Camp. 543. 2 Id. 411. and see Id. 301. 1 Car. & P. 108. 1 Rose, 386. 392. 1 Stark. 132. 2 Id. 302, or to increase the fund out of which the creditors are to be paid, 2 Camp. 301, unless he have released to the assignees, Hardw. 267. 2 Brod. & B. 397. Peake, 28. 1 Car. & P. 582, or assigned his debt. 4 Taunt. 326. 2 W. Bl. 1273. Nor is the creditor of a bankrupt competent to give evidence to deprive the bankrupt of his allowance; for that has the effect of increasing the dividend. 1 Str. 507. A creditor however is a good witness to defeat the commission, 1 Stark. 40.

The bankrupt himself, also, is an incompetent witness to support the commission. 2 Str. 829. 2 H. Bl. 279, and n. and see 1 Stark. 175. 134, or defeat it. 7 Bing. 103, nor is he a competent witness to increase the estate, see 2 T. R. 496, unless he have released to his assignees. 2 Vern. 637. An in an action brought by the assignee of a bankrupt, on stat. 7 Anne, c. 14, to recover money lost by the bankrupt at play, it was holden that the bankrupt, although certificated, was not a competent witness to prove the loss; but that his competency was restored by three releases which had been executed, namely, 1st. a release by the bankrupt to his assignee of his right to any surplus or allowance; 2dly, a release to the bankrupt by all the creditors who had proved upon the estate, (and the commission being then one year in operation, the court held that it might be presumed that there were no more creditors to prove); 3dly, a release from the assignee (who was not a creditor) to the bankrupt. 1 B. & C. 444. But in ordinary cases of actions by assignees, if the bankrupt have obtained his certificate, and have released his right to the surplus and allowance, he is a competent witness to prove any fact which does not prove the fiat or commission to be valid or invalid; and therefore he has been holden to be a competent witness to prove that certain papers produced were the proceedings under the commission, and also to prove the commissioner's hand writing to them. 2 B. & C. 14. If however a bankrupt, who has obtained his certificate, had previously been a bankrupt, or compounded with his creditors, or been dis-

charged under an insolvent act, even a release by him of the surplus and allowance will not restore his competency as a witness to increase his estate; for he is still interested in increasing the dividend under the second fiat to 15s. in the pound, in order to give his certificate the effect of a release as to his future effects. *Peake, R. 3.* And in an action by the indorsee of a promissory note against two persons who had jointly indorsed it, for the accommodation of a person who afterwards became bankrupt, the *bankrupt was holden not to be a competent witness for the defendants, to prove that the note was given by him for an usurious consideration; and that he was not rendered competent by a release from the defendants, but that the defendants must also execute a release to the assignees of their right to prove upon the estate. *8 Bing. 369.* And in order to render him competent as a witness to increase the estate, even with a release, he must have obtained his certificate. Whether the certificate must be actually produced, upon an objection being made to a bankrupt's competency, or whether his statement upon oath of his having duly obtained it be sufficient, is placed in some doubt by the decisions upon the subject. In an action by assignees on several promissory notes of which the bankrupt was payee, the bankrupt was called as a witness, and being examined on the *voire dire* stated that he had obtained his certificate, and had released to his assignees; it was objected that the release should be produced and proved; but *Park J.* held that it was sufficient on the *voire dire* for him to state that he had obtained his certificate and had released to his assignees, without producing either the certificate or release, and that such had been the constant practice at Guildhall. *1 Car. & P. 234.* But in an action by an assignee for the value of goods sold and delivered by the bankrupt before his bankruptcy, *Best, C. J.* held that the bankrupt could not be rendered a competent witness for the plaintiff, without the actual production of the certificate and release; for the objection then did not merely arise upon the *voire dire*, but the bankruptcy of the witness appeared upon the record. *Moody & M. 319.* In a subsequent case, the same objection being made, and this last case cited in support of it, *J. Parke J.* said that he should decidedly overrule the objection; the certificate however was produced. *Id. 321 n.* Until the point is fully settled by decisions of the courts, therefore, it will be prudent in all such cases, particularly where the bankrupt appears upon the record, to have the certificate in court, and to be prepared to produce and prove the release. As to the admissions and declarations of a bankrupt, and in what cases they are evidence for his assignees: it may be observed, that in all cases where the intent with which an act was done, constitutes a part of an act of

bankruptcy, the intent may be proved by any admission or declaration of the bankrupt accompanying or nearly contemporaneous with it; and therefore it has been holden that a declaration by a bankrupt of his motives for absenting himself from his house, made upon his return, was evidence to prove the act of bankruptcy, in an action by the assignees against a debtor of the estate. 5 T. R. 512, and see Bul. N. P. 41. So his admissions previously to the issuing of the fiat, 1 Esp. 168, and see 4 Taunt. 560. 1 Car. & P. 46, or entries made by him in his books before his bankruptcy, 1 Camp. 376, are evidence of the petitioning creditor's debt, because the same evidence would be sufficient to sustain an action for the debt. In an action by his assignees to recover money paid by him by way of fraudulent preference, the bankrupt's declarations as to the state of his affairs, made about the time of the transaction, but unconnected with it, were holden to be receivable in evidence. Moody & M. 353. So in trover by assignees against the sheriff, the declarations of the bankrupt, shewing that the commission had been founded in collusion between him and the petitioning creditor, were holden to be evidence for the defendant, although the petitioning creditor was not one of the assignees. 8 Taunt. 336.

A person discharged under the insolvent debtors' act, cannot be a witness for his assignee, to increase the estate; 1 Car. & P. 253; even although he release the surplus. 6 Bing. 294.

A freeman of a corporation is not a competent witness for the corporation, in any action by or against them; for it would in fact be giving evidence for himself; 5 T. R. 174. 1 Vern. 254. See Gilb. Ev. 126. 127, semb. cont.; but Lord Kenyon, C. J. has allowed it, in a case where the corporation were mere trustees for a public charity, and not otherwise interested in the event of the cause. Peake, R. 206. A parishioner also is not a competent witness for the parish in which he resides; Hob. 92. 2 Vern. 317, and see 1 Car. & P. 328. 140; except in three instances; namely, first, in actions by parishioners, for money misspent by churchwardens or overseers, or wrongfully applied by them to their own use, in which case the evidence of the parishioners, other than such as receive alms, shall be admitted; 3 & 4 W. & M. c. 11. s. 12. See 4 Car. & P. 16. Secondly, In prosecutions, where the penalty (not exceeding 20*l.*) is given to the poor of the parish, in which case a parishioner may be a witness; 27 Geo. 3, c. 29; and lastly, in all matters relating to rates, settlements, bastardy, elections or appointments of officers, or the boundaries of the parish, parishioners may be witnesses. 54 Geo. 3, c. 170, s. 9. 6 Car. & P. 525. Moody & M. 402, n. 7 B. & C. 815, and see 2 B. & Adolph. 236. In actions against the hundred, a hundredor was not a competent witness,

1 Vent. 351. 1 Mod. 73, until specially made so by statute, 8 Geo. 2, c. 16, s. 15; and he is now declared to be a competent witness, either for the defendant or plaintiff, by stat. 7 & 8 Geo. 4, c. 31, s. 5.

Semble, that corporators are not competent witnesses to prove a custom of excluding strangers from exercising trades within the town, where a moiety of the penalty imposed by a bye-law for breach of that custom goes to the corporation. *Davies v. Morgan and others*, 1 Tyr. 457.

By stat. 3 & 4 W. 4, c. 42, s. 26, however, "in order to render the rejection of witnesses on the ground of interest less frequent," it is enacted "that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him." And by sect. 27, "the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence." In an action by the indorsee against the acceptor of a bill of exchange; Lord Lyndhurst, C. B. held that the drawer, for whose accommodation it was accepted, was not a competent witness for the defendant, within the meaning of this statute, and that to render him competent, therefore, the defendant must release him. 6 Car. & P. 282. So, in an action on the case for an injury done to the plaintiff's house, by improperly digging a cellar in the defendant's house which adjoined it, Patteeson, J. held that the man who dug the cellar was not a competent witness within the meaning of this Act, and could not be examined without a release. 6 Car. & P. 351. And the same, as to a carrier's servant, in an action against the carrier for the loss or damage of a parcel intrusted to him to carry. *Id.* 352.

And in order to render a witness incompetent, on the ground of interest, the benefit to be derived by him from the determination of the

cause one way or the other, must appear certain, and not barely possible; a bare possibility that he will be liable to an action, or derive a benefit from his evidence, in a certain event, is not sufficient. Thus, a co-obligor in a bond to the ordinary, under stat. 23 & 24 Car. 2, c. 10, is a competent witness to prove a tender by an administratrix; or a creditor of the administratrix would be a good witness for the same purpose. 1 T. R. 163. Thus also an heir apparent is a competent witness in an action relating to the lands of which he is presumptive heir; for during the life of the ancestor the heirship is but a mere contingency: 1 Salk. 283. L. Raym. 724: and on the other hand, a remainder-man expectant on the determination of an estate tail, would not in such a case be a competent witness; for, in the contemplation of law, he has an estate actually vested in him, although in reality it amounts to little more than a bare possibility. See ante, p. 456. So in an action on the warranty of a horse, the person who sold the horse to the defendant and then warranted him sound, was allowed to be a witness for the defendant, Lord Tenterden, C. J. saying that he knew of no authority to the contrary. Moody & R. 59. S. P. 5 Esp. 99. So, in an action of trespass, where the defence was that the *locus in quo* was a highway, a person was called as a witness for the defendant, who admitted on the *voire dire* that he was owner of a field adjoining the *locus in quo*, and had let to the defendant a way over it for £6 a year and it appeared that the defendant could not get to this way, if the *locus in quo* were not a public road: Lord Kenyon, C. J. held that he was a competent witness, Peake, R. 26. So, in ejectment, a man, who was in fact married to the mother of the lessor of the plaintiff, was holden by Lord Kenyon, C. J. to be a competent witness to prove the marriage invalid by reason of an imperfect publication of banns, although he had subsequently married another in the lifetime of the first wife. *Peake, R. 45. So where a defendant in ejectment claimed to hold the premises in question as heir at law to his father, it was holden that his mother was a competent witness for him, although the effect of her evidence was to prove a seisin in the father, and to shew that she was entitled to dower; for the judgment in the action would be no evidence for her of the seisin of her husband, and her interest in the event was not such as the law of evidence regarded. 1 B. & Adolph. 439. Also, a witness being under a mere honorary engagement, (not amounting to a legal obligation,) which may be affected by the event of the cause, is no objection to his competency. 1 Camp. 144. See 1 Str. 129. cont. So, it should seem that a witness's merely apprehending that he is interested, if in fact he be not so, would not now be deemed an objection to his competency, although formerly holden to be so. See 1 Str. 129.

So, a witness's having a wager depending on the event of the suit, is no objection to his competency, 1 Str. 652. Cowp. 736. 3 T. R. 37, but goes to his credit merely. So, if several be guilty of a trespass, one of them who is not sued is a competent witness in an action against the others, either for his co-trespassers, see Gilb. Ev. 132, 133, or against them. 2 Camp. 333, n. In actions *ex contractu*, one of several joint contracting parties, not suing or sued, is a competent witness against his co-contractors: thus, an obligor not sued, may prove the bond in an action against his co-obligor; 1 Str. 35; or one joint maker of a promissory note, not sued, may prove the signature of the other; 5 M. & S. 71; a partner not sued, may prove the liability of his co-partner sued, for goods sold and delivered for the partnership concern; 5 B. & C. 385. 8 D. & R. 142. 9 B. & C. 646, or for work and labour done for both; 2 Car. & P. 305. 4 Bing. 53; or in an action by one partner, his co-partner may be called as a witness for the defendant, to prove that the debt was paid to himself. Peake, 31. But in an action against one of two partners for a cause of action relating to the partnership, the partner not sued is not a competent witness for the defendant, Ry. & M. 29. Peake, R. 232. 6 Bing. 191, and see 5 Burr. 2727, nor can he be rendered competent by a release. Ry. & M. 29. So in an action for goods sold and delivered, it was holden that the defendant could not call his partner to prove that the goods were delivered on the partnership account, in satisfaction of a debt due from the plaintiff to the partnership. 2 Bing. 133. S. C. 1 Car. & P. 40. But where a committee of several persons, for the management of a public meeting, agreed that if the subscriptions should not be sufficient to defray the expenses, the deficiency should be paid by the members in equal proportions: in an action against one for his proportion, it was holden that another, who had paid his proportion, was a competent witness for the defendant, if released by him, although the other members of the committee did not join in the release. Moody & M. 430. So where in an action upon a banking account, the defendants called as a witness for the defence a person, who was a partner with them during the greater part of the account; and it appearing that upon his retiring from the partnership, general releases of "all demands" were executed by the defendants to the witness, and by the witness to the defendants, the court held that by these releases the witness had been rendered competent. 4 B. & Adolph. 760. So, in replevin by A., where the avowry stated a letting of the premises to A. and B., which was denied by the plea in bar, B. was holden a competent witness for the plaintiff to

disprove the joint tenancy, he not being liable to costs, and the judgment in the action not being evidence either for or against him in any other action. 3 D. & R. 106. So, where two persons, who had contributed equal sums towards the purchasing of a joint annuity, had sustained a loss by the negligence of the conveyancer who procured the security : in an action by one, the other was holden to be a competent witness : for the verdict could not be given in evidence in another action to be brought by him. 2 Stark. 68. For a similar reason, it should seem that one underwriter on a policy may be a witness for another who is sued, unless the several actions against the underwriters have been consolidated by rule of court ; 3 T. R. 27. see Bul. N. P. 283 ; or if an underwriter have paid his subscription unconditionally, he is a competent witness for others on the same policy. 3 Camp. 360. See 1 M. & S. 9. But in an action on a policy of insurance on goods by a certain ship, the owner of the ship is not a competent witness to prove her seaworthy, unless he be released by the plaintiff. Peake R. 117.

Also, if a witness have an equal interest on both sides, that is, if he be liable to one or other party, or is to derive an equal benefit, be the event of the cause what it may, his interest in that case may be said to be neutralized, and no objection can be made to his competency. Thus, an indorser on a note, who has received money from the drawer to take it up, is a competent witness to prove the note satisfied, in an action by the indorsee against the maker ; being either liable to the plaintiff on the note, if the action be defeated, or to the defendant for the money received from him, if the action succeed. 2 East, 458. So in an action by an indorsee against the acceptor of a bill of exchange, the drawer is a competent witness to prove that he paid it ; Semb. Peake, R. 72 ; for if the defendant succeed, the witness may still be sued as drawer. So in an action by an indorsee against the drawer, an indorser is in general a competent witness for either party. Bayley, Bills, 536. and see 2 Car. & P. 372. So in an action by an indorsee of the payee, against the drawer of a bill of exchange or promissory note, the payee is a competent witness ; for he is liable to the defendant if the plaintiff succeed, or to the plaintiff if the defendant succeed. 1 Camp. 407, 408. 2 Camp. 332. and see 2 Stark. 334. So, if one of two joint makers of a promissory note be an uncertificated bankrupt, and an action on the note be brought against the other, the bankrupt is a competent witness to prove the handwriting of the defendant ; because, if the plaintiff succeed, he is still liable to the defendant for contribution. 5 M. & S. 71. But if the plaintiffs had proved their debt under the commission, and thereby relinquished their action against the bankrupt

(see 49 Geo. 3, c. 121, s. 14), the bankrupt could not be a witness for the defendant, 14 *East, 565, although he might for the plaintiff; for he is still liable to the defendant, but not to the plaintiff. But if the witness be discharged from his liability on the bill altogether, by his bankruptcy and certificate, he is of course a competent witness. 5 Taunt. 183. And therefore in an action by an indorsee against the acceptor of a bill of exchange, accepted for the accommodation of the drawer, the drawer, who had become bankrupt and obtained his certificate, was holden a competent witness for the defendant; for as by stat. 6 G. 4, c. 16, s. 62, the defendant might prove upon the estate as soon as he paid the bill, the witness was discharged of his liability to him by his certificate. Moody & M. 127. and see 7 Bing. 217. So, in an action by an indorsee of two bills of exchange against the last indorser, it was holden that the drawer of the bills, for whose accommodation the defendant had indorsed them in order that he might get them discounted, and who had since become bankrupt and obtained his certificate, was a competent witness for the defendant to prove usury; for the defendant, by reason of his accommodation indorsement, was "liable for a debt of the bankrupt" within the meaning of stat. 6 G. 4, c. 16, s. 52, and might prove upon the estate, and was consequently barred by the certificate, so that the witness was no longer liable to him. 9 Bing. 653. If indeed the witness had not been a bankrupt, or being a bankrupt had not obtained his certificate, he would have been clearly incompetent. 4 Taunt 464. In an action for a deceitful representation of the credit of a third person, such third person is a competent witness; for whatever may be the event of the trial, his liability remains the same. 2 Stark. 47. Ry. & M. 48. 1 Camp. 277. Where A. gave a horse to B. as a security for a debt, with liberty to sell it after a certain time if the debt should not then be paid, and it was sold accordingly to C.: in trover by A. against C. for the horse, B. is a competent witness for the defendant; for he is equally liable to one or other party, whatever may be the event of the action. 4 Taunt. 18. So one of two obligors is a competent witness to prove the execution of the bond by the other; for if the plaintiff succeed, he is liable to the defendant for contribution. 1 Str. 35. See ante, 462. So, if a defendant plead that the promises were made jointly with B., B. is a competent witness for the plaintiff, to prove that he was not jointly interested in the contract; for if the plaintiff succeed, B. will be liable to the defendant for contribution if he can be proved to be interested; and if the defendant succeed, B. will be equally liable to the plaintiff. 4 M. & S. 475. He is not, it seems, a competent witness for the defendant. Moody & M. 241, n. But where the defendant pleaded that the promi-

ses were made to the plaintiff and J. S., Parke B. held that J. S. was a good witness for the defendant to prove it. 6 Car. & P. 619. In all these cases, where the interest of the witness is said to be balanced, it was formerly holden that if he were equally liable to the respective parties as to the matter of the action, his being also liable to one of them (and not to the other) for the costs incurred in the action in case of a decision against him, did not affect his competency as a witness for that party, but merely went to his *credit. 2 East, 458. 7 T. R. 480. But the rule is now understood to be otherwise. Therefore, in an action by the indorsee against the acceptor of a bill of exchange, which had been accepted for the accommodation of the drawer, it was holden that the drawer was not a competent witness for the defendant; for although he would be liable to the plaintiff for the amount of the bill, if the defendant succeeded in the action, yet if the defendant failed in the action the witness would be liable to him, not merely in the amount of the bill, but also for all damages sustained by him, including the costs of the action against him. 4 Taunt. 464. And in a recent case, Tindal, C. J. recognized this case in 4 Taunt. as good law. 9 Bing. 658. So, where a man drew a bill for value upon another, in his own favour, and upon the acceptor saying he could get it discounted, the drawer indorsed it and handed it to him for that purpose, and the acceptor placed it in the hands of J. S. (to whom he was indebted in a smaller sum) for the purpose of discounting it: in an action upon the bill by J. S. against the drawer, it was holden that the acceptor was not a competent witness for the defendant to prove these facts; for although equally liable to both parties as far as respected the amount of the bill, yet "he was interested in the result of the action, inasmuch as the costs, if the plaintiff succeeded, would ultimately fall upon himself. 8 B. & C. 407. In this last case it was urged, that even if the general rule were so, this was an exception to it, by reason of the witness's employment as agent for the drawer; but Lord Tenterden, C. J. said that although agents employed in the ordinary transactions of commerce are, *ex necessitate*, excepted out of the rule, yet as the witness's only connection with or agency for the defendant arose out of the transaction in question, he was not excepted, and therefore not competent. *Id.* So, in an action for the amount of wine delivered by the plaintiff to the defendant, the defendant called F. as a witness, to prove that he had bought the wine of the plaintiff, sold it to the defendant, and that the defendant had paid him; Lord Tenterden, C. J. at the trial, assuming that F. had obtained payment from the defendant by a false and fraudulent representation that the wine was his, held

that he was not a competent witness for the defendant, for if the plaintiff succeeded, he would be liable to pay the defendant not only the amount of the wine, but the costs of the action also, and therefore his interest between the plaintiff and defendant was not equal; and afterwards, upon a motion for a new trial, the court held clearly that if the witness had obtained payment by such a representation as would render him liable to the defendant for the costs of the action, he was incompetent as a witness for him; but as there had been no evidence of any such representation, the court granted a new trial. 1 B. & Adolph. 899.

To the rule here laid down, that a person interested in the event of the suit is not a competent witness, there are however some exceptions:—First, In an action by a master for goods sold and delivered, the servant who delivered them is a good witness to prove the delivery, though his testimony tend to exonerate himself. Bul. N. P. 289. So, a servant who pays money for his master to a third person, is a competent witness to prove the *payment. 4 Mod. 26, and see 1 Salk. 289. 7 T. R. 480. 1 Str. 507. 547. So, a broker or general agent who makes a contract, is a competent witness to prove such contract in an action by his principal; 3 Wils. 407. 1 Car. & P. 216: even where he is employed to sell goods, and he is to have for himself whatever money he can procure for them beyond a certain sum, he is a competent witness to prove the sale. 2 H. Bl. 590. So, where A. employed a carrier to carry two sums of money, one to B. and the other to C., the carrier was holden to be a competent witness, in an action by A. against C., to prove that he delivered both sums to C. by mistake. 3 Camp. 144. So in an action against a carrier for not delivering a parcel according to a particular direction, Lord Kenyon, C. J. held the carrier's book-keeper to be a competent witness for his master, to prove how the parcel was directed, and that it was delivered according to the direction. Peake, R. 176. In these cases the testimony of obviously an interested witness is admitted through necessity; for it would be impossible to carry on trade, if the servants engaged in it were not allowed to be witnesses, for their principal, of the transactions in which they are necessarily concerned. And, for nearly the same reason, a servant who had embezzled his master's goods and pawned them, was admitted a competent witness in trover by the master against the pawnbroker for the goods. Bul. N. P. 290. So in trover by a principal for goods pledged by his factor, the factor is a competent witness for the plaintiff. 1 Car. & P. 190. But if the master be sued for the negligence of his servant, the servant, although a good witness for the plaintiff, is not a competent witness for his master, without a release. 4 T. R. 589.

4 Camp. 80. 392. 2 L. Raym. 1007. 1 Holt, 139. See 2 Str. 1083. So, in an action against the sheriff for a false return, the bailiff to whom the warrant was directed, is not a competent witness for the sheriff, 1 Str. 650. 2 L. Raym. 1411, although unobjectionable as a witness against him. But an assistant to the bailiff is a competent witness for the sheriff, although his employment may furnish fair matter of observation as to his credit. Ry. & M. 32. 1 Car. & P. 156. So, in an action for running against the plaintiff's cart with a dray, the servant who was driving his cart at the time the accident happened, is not a competent witness for the plaintiff, without a release; for he comes to discharge himself, being answerable to his master if the accident happened through his fault: 1 Camp. 251. 8 Taunt. 454, and see 6 Car. & P. 542: he would be an unobjectionable witness, however, against his master. So, the master and owner of a ship or barge, is a competent witness for the owner of goods on board, in an action by him against a person, by whose negligence the ship or barge was sunk, and the goods damaged, if he have a release from the plaintiff, Peake, R. 74, but not otherwise; but in an action against the owner of a ship, for not safely carrying corn put on board, the captain is an unobjectionable witness for the plaintiff, to prove that the ship was not seaworthy, Peake, R. 137, or the like. So in trespass, where the defendant pleaded a licence, and the plaintiff replied excess, upon which issue was joined: the defendant's workmen, by whom the trespass *(if any) was committed, were holden competent witnesses without a release; for the act complained of was done by the orders of the defendant, and the workmen were consequently not liable over to him for the amount of any damages to be recovered, as in the cases above mentioned. 3 Camp. 515. On the other hand, an agent who purchased goods in his own name, was holden not to be a competent witness to prove that he purchased them as agent for the defendant, against whom an action had been brought for the value of them. 3 Camp. 317. A captain of a ship, however, who borrowed money of the plaintiffs for the use of the ship, was holden a competent witness of that fact, in an action against the owners, although the defence set up by the owners was that he had borrowed the money for his own use. 7 T. R. 481, n.

In support of a plea of payment, the defendant proved a payment to the plaintiff's attorney: holden, that the plaintiff's attorney was a competent witness for him, to prove that the defendant, after paying him the money, called upon him and got it back. *Bowers v. Evans*, Tyr. 1 & Gr. 572.

In an action for the battery of a servant, *per quod servitium amisit*, 2

Str. 414. See Id. 595. 944. 3 Wils. 18, and in an action for seduction, 2 Str. 1054. 3 Camp. 519. and see 3 Wils. 18, the servant or daughter is a competent witness for the plaintiff; for in law they are not deemed interested in the event of the action, however interested they may be in reality.

Secondly, In an action for non-payment of a public toll or the like, persons equally liable to pay the toll as the defendant, are competent witnesses for him of necessity, even although the toll may have been demanded of them, and they may have refused to pay it; for the contrary rule would have the effect of excluding the testimony of every witness who could give evidence upon the subject. 9 Bing. 465.

Thirdly, A man may be a witness to invalidate a negotiable security, to which he himself is a party; as, by proving that a bill of exchange purporting to be drawn at Hamburg, in his own favour, and indorsed and negotiated by him, was in fact drawn in London, and without a stamp; 7 T. R. 601; or that it was made for an usurious consideration; Peake R. 293; or any other matter which shews that the bill was void in its inception. See 3 T. R. 27. Peake R. 8. see 1 T. R. 296. cont. In a *qui tam* action for usury, also, a party to the usurious contract may prove the usury, if he have repaid the money, 7 T. R. 60, but not otherwise; Gilb. Ev. 124. 1 Str. 633. and see 2 T. R. 496; and he is also a competent witness to prove the repayment of the money, as well as the other facts. 4 Bur. 2251. 7 T. R. 60. So, in an action against an attorney for negligence in the negotiation of an annuity, the alleged grantor of the annuity was holden to be a competent witness for the plaintiff, even without a release, to prove that his signature to the annuity deed was a forgery. 4 B. & Ald. 209.

Fourthly, In an action for bribery at an election for a member of parliament, a man may be a competent witness, notwithstanding another action has been brought against himself for bribery at the same election, and he intends to avail himself of being the first discoverer, if the present defendant be convicted. 4 East, 180. and see 3 East, 451.

Fifthly, If the interest (which would otherwise render a witness incompetent) arise after the plaintiff or defendant has acquired an *interest in his testimony, he shall be allowed to give evidence. 3 T. R. 27. and see 1 P. Wms. 287. 2 Vern. 699. As, if the witness have laid a wager on the event of the cause, this shall not deprive either party of his testimony. 1 Str. 652. Cowp. 736. 3 T. R. 37. So, where an insurance broker underwrote a policy of insurance, after getting it underwritten by others, it was holden that he was a competent witness for any of those whose names preceded his upon the policy: for his becoming interested by his own act, after they had sub-

scribed the policy and had thus acquired an interest in his testimony, ought not in fairness to deprive them of any evidence he might be able to give in their favour; if the rule were otherwise, a witness would have it in his power to destroy his own competency, at his pleasure. 3 T. R. 27. In this case also, the witness had engaged to contribute to the defendant's costs, had an action depending against himself upon the same policy, and joined as a plaintiff in a bill in equity for a discovery; but the objections arising from these circumstances were holden to be obviated by the defendant's releasing the witness from any contribution to the costs in law or in equity, and by an offer by the witness and defendant to pay the costs in equity and dismiss the bill as to them. *Id.* See 3 Camp. 380. 1 M. & S. 9.

What we have hitherto said, of course relates to cases only where the witness is interested to give evidence in favour of the party who calls him; if he be called for the purpose of giving evidence contrary to his interest, he is certainly an unobjectionable witness in this respect. Where a person, who had been bargaining for a flute, sent his servant to the owner for it to look at, and with a message that if he liked it he would keep it; afterwards in an action of trover by the owner against the servant for the flute, the master was holden to be a competent witness to prove the message he sent by the defendant, and that he had received and kept the flute. 2 B. & Adolph. 514. So in an action against executors, Lord Tenderden, C. J. held that the widow of the testator was a competent witness for the plaintiff to an admission by her late husband of the debt, for she was in fact giving evidence against her interest. 1 Car. & P. 384. So, in trover for a barge, which the plaintiff claimed as having been brought by him of B., and the defendants claimed as being bought by them of C., who they alleged had bought it of B.: B., who was released by C., was holden to be a competent witness for the defendants, without any release from them. 4 Bing. 649. And not only is a person a competent witness against his interest, but in most cases he can be compelled to give the evidence; for by stat. 46 Geo. 3, c. 37, no witness shall refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself or expose him to penalty or forfeiture of any nature whatsoever,) on the sole ground that the answering of such question may tend to establish that he owes a debt or is otherwise subject to a civil suit.

If the interest arise from the witness's liability to the party who calls him, (in the event of a verdict against that party,) the witness's competency may be restored by a release, as has been *already incidentally mentioned. Thus, in an action for running down a ship,

brought against the owner of a ship which was the occasion of the injury, the defendant's captain may be rendered a competent witness for him, by a release from the defendant; see 4 Camp. 80. Peake, R. 74; or the pilot, under whose management the defendant's ship was, at the time the accident happened, may be rendered competent by a release from the defendant, although hired and paid by the captain. 4 Camp. 392. 1 Stark. 214. Where an infant sues or is sued by guardian, a release by the guardian, it seems, is not sufficient; for he is not guardian for the purpose of releasing. 2 Stark. 41. If, on the other hand, the interest arise from any gain or advantage likely to accrue to the witness from the event of the suit, he may render himself a competent witness by executing a release to the party from whom the gain or advantage is expected to be derived. Thus a creditor of a bankrupt may be rendered a competent witness to increase the assets, by his executing a release, not to the bankrupt, but to the assignees. Hardw. 267. So, if a devisee or legatee execute a release of his interest, he may be examined as a witness in support of the will, even although the releasee refuse to accept the release. 1 Doug. 139. As to the effect of a release, see 1 Camp. 249. 2 Stark. 340. 4 Esp. 86. 7 Bing. 428. It may be necessary to mention that if the interest appear otherwise than on examination upon the *voire dire*, it is not sufficient that the witness say that he is or has released, but the release must be produced, or proved by secondary evidence as in ordinary cases. 1 Camp. 37.

Formerly the objection to the competency of a witness on the ground of interest, must have been made before the witness was sworn in chief; but now it may be made at any time during the trial, before the judge has commenced the summing up of the evidence. See 1 T. R. 717. 1 Esp. 37. However it is still in many cases desirable to make the objection before the witness has been examined in chief, and if he can be examined as to it, to examine him on the *voire dire*. Where a witness was examined on interrogatories, and upon the interrogatories and answers being about to be read at the trial, an objection was made to the competency of the witness on the ground of interest: Gibbs, C. J. held that the objection was too late; it should have been made before or at the time of the examination. 1 Holt, 485.

The principal laid down in the foregoing observations, namely, that the testimony of an interested witness shall not be received, must not be considered as extending to the case of hearsay evidence: for although the declarations, intended to be detailed in evidence, were made by a person who was interested in the subject of them, still if made *ante litem motam*, the hearsay evidence may be received. See Ry. & M.

141, and ante, p. 450. But if, on the contrary, the declarations were made relative to matters then in actual suit, or in dispute and actual controversy prior to the commencement of judicial proceedings, the judges make it a rule to reject them, although made by persons apparently disinherited, because of the *possibility or probability that they have been made to serve one or other of the contending parties. See 4 Camp. 406. *Berkeley Peerage case*.

From being Parties to the Suit.] The general rule upon this subject is, that a person who is a party to the action, shall not be allowed to give evidence for, or obliged to give evidence against himself. Even although he be but trustee for another, he is not a competent witness for his *cestui que trust*. See Gilb. Ev. 121. On the other hand the *cestui que trust* is not a competent witness for his trustee, on the ground of interest; (see 2 Taunt. 325;) but he is a good witness against him; (but see 5 T. R. 578;) yet if called as a witness for the opposite party, although merely for the purpose of producing documentary evidence, and be sworn, he is then to be deemed a witness for all purposes, and may be cross-examined as to the whole of the case. Thus, in an action against the sheriff, the bailiff, we have seen, for whose negligence, &c. the action is brought, is incompetent as a witness for the defendant; but if he be called by the plaintiff, for the purpose of producing the warrant, or the like, he may then be cross-examined as to the whole of the case, 2 Stark. 314. MS. E. 1814, if he have been sworn on the part of the plaintiff, but not otherwise. See Moody & M. 514. In an action by or against an infant, the *prochein amy* or guardian is in like manner incompetent as a witness for the infant; because he is a party on the record, and liable for costs. 1 Str. 506. 2 Str. 1026. Gilb. Ev. 120. Where the trustees appointed under an act of parliament for the lighting and paving of a parish, were authorized to sue in the name of their treasurer, in an action so brought Lord Tenterden, C. J. expressed himself strongly inclined to think that one of the trustees was not a competent witness for the plaintiff. Moody & M. 220. 214. But in an action against the Governors of the Foundling Hospital for work and labour, Lord Kenyon, C. J. allowed several of the governors to give evidence for the defendants, as the action was against them in their corporate and not in their individual capacity; he said the case was different from that of a mayor and citizens, who though sued in their corporate name, might still have a great personal interest in the event of the cause, having often great and important rights to support; but these defendants had not the least personal interest, being mere trustees of a public charity. Peake, R. 206. And where the corporations are not merely trustees, and the costs of the action (if the corpora-

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tion fail in it) are to be paid out of the corporate funds, a corporator is not a competent witness for the corporation, nor can he be made so by any release of his interest in the subject-matter of the suit. 3 Young & J. 19. So, one of two defendants cannot be a witness for the other: It often happens, however, that the plaintiff, in actions *ex delicto*, makes the principal witness for the defendant a co-defendant, in order to exclude his testimony; and therefore, in order to prevent the injustice that *might arise from such unfair conduct, the judge at *nisi prius* (in his discretion, 1 Holt, 275,) if no evidence whatever be given to affect such a defendant, may direct the jury to acquit him in the first instance, so as to give an opportunity to the other defendant to avail himself of his testimony. Gilb. Ev. 131, 132. Bul. N. P. 285, and see 1 Str. 633. And this, which was formerly deemed to be in the judge's discretion, now seems to be considered a matter of right, the judges having unanimously resolved that all defendants not fixed by the plaintiff's evidence, shall be acquitted, before any part of the defence is gone into. Per J. Parke, J. 6 C. & P. 215. 213. See Ry. & M. 128. 7 Taunt. 607, cont. Formerly, where one defendant pleaded to issue, and the other pleaded bankruptcy, the judge at the trial would not allow the bankrupt to be acquitted in the first instance, upon proof of his certificate, in order to let in his evidence for the other defendant; 3 Camp. 283. 7 Taunt. 599; but in a late case, upon an application to this effect being made, and it being stated that Lord Tenterden had recently allowed it, J. Parke, J. directed an acquittal of the bankrupt, and received his evidence for his co-defendant; observing, that from the change that had taken place in the bankrupt law the former cases were no longer authorities in point; he gave the plaintiff leave, however, to move for a new trial, if the court should hold the evidence inadmissible; and the plaintiff afterwards moved for and obtained a new trial, but not upon this ground. Moody & M. 332. But the court, before trial, even in ejectment, will not allow a defendant's name to be struck out, upon affidavit that he is not interested in the premises, and is a material witness for the other defendants; Hardw. 162; the better way in such a case is for the defendant to allow judgment to go by default, and then he can be a witness for the others; Bul. N. P. 285. 2 Camp. 333, n. 2 Esp. 552; or if at the trial he consent to a verdict against him for so much as he is proved to be in possession of, there seems to be no reason why he should not be admitted a witness for the other defendants. Bul. N. P. 285. But where one of several defendants allows judgment to pass against him by default, in an action *ex contractu*, he cannot be a witness for his co-defendant, for if that defendant could obtain a verdict, the judgment could not be enforced against

the witness. 1 Ph. Ev. 78. But in actions *ex delicto*, where that reason does not apply, Lord Kenyon, C. J. has allowed a defendant, against whom there was judgment by default, to give evidence for his co-defendant; 2 Esp. 552; and Best, C. J. in another case allowed it, on the authority of the last case, but at the same time expressed a very strong opinion against the practice. 1 Car. & P. 577. Perhaps in such a case he might safely be holden to be a competent witness to prove that his co-defendant is wholly innocent of the trespass or other tort imputed to him; but that his evidence should be received, to give a colour to the transaction or other matter of the action, which might have the effect of diminishing the damages, is seemingly against the first principles of evidence; for as damages are to be assessed against the witness, by the same jury who try the issue against his co-defendant, the *witness is still substantially a party to the action, and would be giving evidence for himself. In ejectment, indeed, this objection does not apply; for a tenant, who has suffered judgment by default, is in fact no party to the action. Nor can a defendant, who has allowed judgment to pass against him by default, be a witness for the plaintiff, without the consent of his co-defendants, 8 Taunt. 139. 2 Camp. 333, n., unless it appear that he has no interest in procuring a verdict for the plaintiff against his co-defendant, 7 Bing. 395, and except also in ejectment. 4 Esp. 198. Where however the plaintiff enters a *nolle prosequi* as to one of two or more defendants, that defendant is no longer a party to the suit, and the question as to his admissibility as a witness then becomes a question merely of interest, and must be decided accordingly. Where upon the 14th of July a partnership between A. and B. was dissolved, and on the 17th the dissolution was advertised; on the 16th A. drew a bill in the names of the firm upon C., which C. accepted for A.'s accommodation and not for B., and which C. afterwards paid; C. then brought an action against A. and B. for the amount, to which B. pleaded the general issue, and A. pleaded his bankruptcy and certificate, and a *nolle prosequi* was thereupon entered as to him; and at the trial the question was, whether A. was a competent witness for B. to prove these facts: the court held that he was; as the partnership had been dissolved on the 14th, the drawing of the bill was not a partnership transaction as between A. and B., and B. was only a surety for A.; and as he might therefore prove upon the estate, and A.'s certificate was consequently a bar to any claim B. might have upon him upon this account, A. was therefore a competent witness for B. 2 B. & C. 558. 4 D. & R. 30. So, where one of two partners accepted a bill in the name of the firm, for his own purposes, and afterwards became bankrupt and obtained his certificate; and in an action by an indorsee against

both as acceptors, in which the bankrupt pleaded his certificate; and a *nolle prosequi* was entered as to him, the bankrupt, having released his interest in the surplus of his effects, was admitted as a witness for the solvent partner to prove these facts: and the court afterwards held that he was a competent witness; for although the solvent partner was not in strictness a surety in this instance for his bankrupt partner, yet he might be deemed, as far as respected the latter's share, a person liable for the debt of another, within the meaning of the bankrupt act, and in that character would be entitled to prove under the commission. 6 Bing. 306. In replevin by A., where the defendant made cognizance, first, as bailiff of B., stating a demise from B. to C., and secondly, as bailiff to C., stating a demise from C. to the plaintiff; at the trial, the defendant, upon his abandoning the cognizance as bailiff of C., was allowed to call C. as a witness: and the court held that he was a competent witness, for after the cognizance under him was abandoned, he was in fact a stranger to the suit. 2 Ad. & E. 333. See 1 Bing. 210. 5 Esp. 272. In trespass, a person included in the *simul cum* is a good witness for the defendant, Bul. N. P. 285. Hardw. 264, unless the plaintiff prove, not only an ineffectual endeavour to serve such *person with process, but also that he is guilty of the trespass. Bul. N. P. 285. Hardw. 123.

Nor shall a party to the action be compelled to give testimony for his adversary. Even in ejectment, on the several demises of two persons, where the title appeared to be exclusively in one of them, it was holden that the other could not be compelled to be examined as a witness for the defendant. 3 Camp. 177. In actions *ex delicto*, however, the plaintiff may omit to sue one of the parties, in order to make him a competent witness for him at the trial. 1 Sid. 441. 2 Camp. 333, n. 5 B. & C. 387, per Abbott, C. J. 9 B. & C. 647, per Lord Tenterden, C. J.. See Style, 401, 404. Sav. 34. 2 Ro. Abr. 685. Bul. N. P. 265. And where a defendant pleaded in abatement that the contract was made by him jointly with A., A. was holden to be a competent witness for the plaintiff, to disprove the defendant's plea. 2 Stark. 414. But a person actually sued, although he allow judgment to go by default, is not a competent witness against his co-defendant, 4 Taunt. 752. 2 Camp. 333 n., without the consent of the latter, unless indeed it appear that he has an interest in procuring a verdict against him. *Supra*. In one case, indeed, by consent of parties, one of the plaintiffs was allowed to give evidence upon oath, although he came to defeat the claim of another party suing jointly with him. 1 Taunt. 378. The case however is an anomaly; and it must be recollected that both the plaintiffs and defendants consented.

To the rule above laid down, namely, that a party to the suit shall not be allowed to give evidence in his own favour, there are two exceptions: *First*, in an action against the hundred, on the statutes of hue and cry, the party robbed is a competent witness to prove the robbery: Gilb. Ev. 128, 129. 3 Mod. 114, 115. *per cur.*; and this from necessity; for in most cases of that description, it would be impossible to procure other evidence. The hundredors also are now made competent witnesses for the hundred, by stat. 8 G. 2, c. 16, s. 15. 7 & 8 G. 4, c. 31, s. 5.

Secondly, Informers in actions upon penal statutes, are in many cases made competent witnesses, either by the express provision of the statute creating the penalty, or by necessary implication. See Gilb. Ev. 129, 130. 2 L. Raym. 1545. Andr. 18. 240. 1 Str. 316. 10 Mod. 194. 1 Esp. 169.

Thirdly, In actions for malicious prosecutions, it is said to have been decided that what the defendant swore upon the trial of the indictment, &c. is good evidence for him in the action. Bul. N. P. 14. But this perhaps may reasonably be doubted.

From the relation to the Parties.] Husband and wife can never be witnesses, either for or against each other, in civil actions; Co. Lit. 6 b. Gilb. Ev. 133, 134. 4 T. R. 678. 2 T. R. 263. Hardw. 264. Bac. Abr. Evidence, A. 1. see 1 Str. 504; even although the marriage was after action brought, and after the witness had been served with a subpoena. 3 C. & P. 558. And Best, C. J. refused to allow a witness to be examined as to conversations she had had with her *deceased husband. Ry. & M. 198. And where husband and wife were divorced by act of parliament, and she was afterwards called as a witness against him, to prove a contract made by him during the marriage, Lord, Alvanly, C. J. held that she could not be examined upon the subject, although competent as a witness of any facts which took place after the divorce. *Monroe v. Twisleton*, Peake, Ev. App. 89. See 5 C. & P. 12, *semb. cont.* Also, in all cases where the husband is an incompetent witness, by reason of interest, the wife is incompetent also, for the same reason. See 12 East, 250. But a man's mistress may be a witness either for or against him, although she go by his name, and he have holden her out to the world as his wife. 4 Bing. 610. 3 Car. & P. 238. And a wife may be a witness of a fact, which may have the effect of charging her husband, if he be not a party to the action. 1 Str. 504. 5 Bing. 183. So, in a settlement case, where after a man had proved his marriage with the pauper, the opposite party, in order to shew that the marriage was invalid, called a woman who proved that she had previously been married to the wit-

ness; the Court of King's Bench held that she was a competent witness to prove that fact; she was not called to contradict her husband, and even if she were, the court seemed to be of opinion that she would be a competent witness for that purpose; and it was no objection to her evidence that the effect of it was to prove her husband guilty of bigamy, as the evidence was not given in any proceeding against the husband, nor could any thing she then said, or any judgment of the sessions founded upon it, be given in evidence against the husband upon any indictment against him for that crime. 2 B. & Adolph. 639. and see 6 M. & S. 194. And the rule in other respects is strictly confined to the relation of husband and wife: for a father or mother may be a witness for or against the child; 1 Wils. 333. 2 T. R. 263. 6 T. R. 330. Hardw. 277. 1 Salk. 289. 2 Str. 925. 940. Cowp. 591; a child, for or against the father or mother; Gilb. Ev. 135; a servant, for or against the master or mistress; Id.; a master or mistress, for or against the servant.

Counsel, solicitors, and attornies, are privileged from giving (indeed they will not be permitted to give) evidence of any matters confided to them by their client, in their professional capacity, Gilb. Ev. 136. 4 T. R. 753. and see 2 Camp. 9. 2 Stark. 274, either in the cause respecting which the communication was made, or in any other, 4 T. R. 753, whether the client be a party to the cause or not. 2 Camp. 578. And on this ground Abbott, C. J. refused to receive evidence of the time at which counsel for the opposite party had been retained, holding it to be a confidential communication. Ry. & M. 165. 1 Car. & P. 545. The communication, however, to be privileged, must have relation to some cause or suit depending or in contemplation. Ry. & M. 34. per Abbott, C. J. 3 Car. & P. 518. Moody & M. 233, or to a matter then in dispute or controversy. Moody & R. 3. But where a client requested an attorney to draw an assignment of certain goods, which the attorney refused to do, and it was afterwards prepared by another attorney, the Court of Common Pleas held that the communication with the *first attorney was privileged, and that he should not be permitted to give evidence of what passed between him and his client upon that occasion; in an action afterwards relating to the validity of the assignment, Richardson, J. said, "Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw?" 2 Brod. & B. 4. And what a trader, who was afterwards a bankrupt, disclosed to an attorney, in consulting him about the state of his affairs, has been holden by Tindal, C. J. to be a privileged communication;

which the attorney was not at liberty to divulge. 5 Car. & P. 177. But where a communication is made to an attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, it is not privileged, and the attorney may disclose it in evidence in any action in which he is called as a witness. 2 B. & C. 745. So an attorney will be allowed to prove that his client delivered to him a certain paper, as for instance, a signed bill of costs, *Moody & M.* 303, or the like. And in an action by the assignees of a bankrupt, to recover the value of goods fraudulently assigned by the bankrupt to the defendant, and in which the assignment was set up as the act of bankruptcy, the plaintiffs called the attorney who prepared the assignment for the bankrupt, to prove the communications then made to him by the bankrupt; upon this being objected to by the defendant, as being a privileged communication, *Best, C. J.* held that if the bankrupt did not object to the disclosure, the defendant had no right to make the objection, and he accordingly received the evidence. 2 Car. & P. 275. So, what the mortgagor has said to the mortgagee's attorney, in negotiating the loan with him, cannot be deemed a privileged communication, 6 Car. & P. 381, the rule being confined to confidential communications to the party's own attorney. And an attorney for a party in a cause may be called by the opposite party, and asked who employed him, in order that the acts or declarations of such party may be given in evidence against him. *Moody & M.* 410. But an attorney is not bound, on a *subpœna duces tecum*, to produce any deeds or papers belonging to his client in his custody, if it appear that the production will operate to the prejudice of his client. 1 Stark. 95. And where the vendor and purchaser paid an attorney in equal moieties for the draft of a conveyance, which was allowed to remain afterwards in the attorney's hands, it was holden to be a confidential deposit by both parties, and that the attorney could not produce it in evidence against the interest of the purchaser's devisees, although he had the consent of the vendor and his attorney to do so. 2 Ad. & E. 171. So where the title deeds of a mortgaged estate were in the hands of a person to whom the mortgage had been assigned, and the mortgagee's attorney had made an abstract of it, it was holden not only that the assignee was not bound to produce them upon a *subpœna duces tecum* in a proceeding between other parties, but that the mortgagee's attorney was not bound to produce the abstract, or give parol evidence of the contents of the deeds; other secondary evidence should have been *given. 8 D. & R. 726. But where the attorney of a mortgagee, in a suit by a third person against the mortgagor, refused to produce the mortgage deed, and the judge at the trial held that he ought to give parol evidence of its contents, the Court of King's Bench

thought that the evidence was admissible ; but even if not, as the defendant was not the privileged party, he had no right to object to the parol evidence. 1 Ad. & E. 31. And where by an order of a court of equity, a lease was deposited with the lessor's attorney, it was holden in an action between the lessee and lessor, that the attorney was not privileged from producing the lease, for it formed no part of his client's title. 9 B. & C. 288. And what is here said as to attornies, is equally applicable to their clerks when acting on behalf of their masters, 2 Car. & P. 195, to their agents, 2 Stark. 239, and to persons employed by them, as interpreters between them and their clients. Peake, 78. This privilege, however, is to be considered as excluding the disclosure merely of such facts as have been communicated confidentially by the client to the attorney, &c. in his professional capacity ; and therefore does not extend to facts known to the attorney previously to his retainer ; Gilb. Ev. 136. 1 Vent. 197. Skin. 404 ; nor to the contents of a notice, served upon him by the attorney on the other side, requiring him to produce at the trial, a certain paper belonging to his client in his hands ; 7 East, 357 ; or the like. The privilege also is strictly confined to counsel, solicitors, attornies, and their agents, &c. : it does not extend to the steward, clerk, or other agent of the party, 2 Atk. 524. 4 T. R. 753. 1 Car. & P. 337, or to a conveyancer, 2 Atk. 525, or banker, 2 Car. & P. 325, or to a physician or other medical person, 11 St. Tr. 243. 4 T. R. 753. 1 Car. & P. 97, or executor, 1 Id. 375, however confidential the communication to such persons may be.

It may be necessary to add, that a judge may give evidence, even in the very case in which he is judge. 2 Hawk. c. 46, s. 17. Kelyng. 12. So, a juror may give evidence ; 2 Hawk. c. 46, s. 17. See Gilb. Ev. 37 ; but it is right that he should inform the court of his having evidence to give in the case, before he is sworn as a juror, and perhaps it would be better for him in such a case to decline acting as juror, if the court will permit him. So a commissioner of bankrupts has been allowed to give evidence to support a commission under which he himself acted. 2 Stark. 302, see 3 Camp. 337.

SECT. III.

Credit of Witnesses.

The credibility of a witness is compounded of—his knowledge of the facts he testifies,—his disinterestedness,—his integrity,—his veracity,—and his being bound to speak the truth, by such an oath as he deems

obligatory. Proportioned to these, is the degree of credit his testimony deserves from the court and jury.

**From their Knowledge.]* Although a witness be perfectly disinterested, although he be a man of integrity and veracity, and have a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium; from his attention being occupied more by the circumstances accompanying it, than by the fact itself, at the time of its occurrence; or from a thousand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake. Where there is a doubt, therefore, whether the evidence given by a witness be not founded in some misconception, it is the duty of the counsel who cross-examines him, to question him as to the sources of his knowledge; his reasons for believing the fact to be as he has stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark, and whether he was near or distant, at the time it occurred; and the like: so that the jury may be able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuse to answer such questions, or do not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

In the case of hearsay evidence, also, the declarations given in evidence must appear to be those of persons who were, at least, likely to have a perfect knowledge of the facts mentioned by them. Thus, in cases of pedigree, none but the declarations of members of the family are receivable in evidence; those of mere acquaintances, or servants, or even the general reputation of the neighbourhood, are not. 13 Ves. Jun. 514, 147. ante, p. 450.

From their Disinterestedness.] A witness, to be perfectly credible, must not be, in the slightest degree, biassed or partial to one party or the other. Interest in the event of the suit, we have seen, will render him altogether incompetent; but any interest or partiality whatever will detract from his credit. If an action be pending against the witness, upon the same or a similar point to that in issue in the action in which he appears as witness, it is an objection to his credit, though not in all cases to his competency. A father is a competent witness for his son, and a son for his father; but the interest arising from the relationship detracts proportionably from the credit of the witness.

See 2 Hale, 276. Gilb. Ev. 149, 155. See as to hearsay evidence ante, p. 460.

From their Integrity.] A conviction for treason, felony, piracy, *præmunire*, perjury, forgery, conspiracy, barrettry, and the like, we have seen, (ante, p. 453,) renders a witness incompetent; but the commission alone of such offences, without conviction, and the commission of all other offences which import falsity or fraud, whether followed by conviction or not, affect the credit of the *witness. And, therefore, where a woman, who had before sworn that A. was the father of her bastard child, was afterwards produced as a witness to prove that B. was in fact the father, and that it was at the instigation of B. she had before sworn it to A.: the court held that she was not an incompetent witness for that purpose, but the fact furnished a strong objection to her credit. 11 East, 309. So, where in an action against T., as part owner of a ship, for the amount of goods furnished to it, the plaintiff having proved that T. was one of the registered owners at the time the goods were furnished, and that he afterwards executed a bill of sale of his share to C. another part-owner, it was holden that C., upon whose oath the former register was obtained, was a competent witness for the defendant, to prove that he had inserted the defendant's name in that register without his privity or consent, and that the bill of sale was merely for the purpose of divesting him of any interest he might be supposed to have under the register. 5 M. & S. 244. So, a man has been deemed a competent witness to prove a defect in the publication of the banns, which rendered his marriage void, although after cohabitation with the first wife for many years, he had afterwards married another; but Lord Kenyon, C. J. observed, that although the objection did not go to his competency, it very much affected his credit. Peake, R. 45. You cannot however, in cross-examination, ask a witness a question, the answer to which in the affirmative would amount to an admission that he committed some offence, for which he might be subject to punishment or penalty. 2 Hawk. 46, s. 20. 3 Taunt. 424. and see Moody & M. 192. 108. 1 Car. & P. 11, 335. 85. 46 Geo. 3. c. 37. As to questions, the answers to which merely go to degrade a witness, but not to subject him to punishment, they may not only be asked, but must be answered. Moody & M. 108. and see 4 T. R. 440. 2 Stark. R. 241. Also, questions, the answers to which may subject a witness, not to punishment, but merely to an action for a debt or other civil suit, may be put, and must be answered. 46 Geo. 3. c. 37. Where the questions are such as should not be put, it is for the witness to object to them, or the judge at the trial usually informs him that he is not bound to answer them; but the court will not allow the

point to be argued by counsel. *Moody & M.* 48, n. If the witness however, answer some such questions without objection, he cannot afterwards object to his being cross-examined about the whole matter. 1 *Car. & P.* 278. And where in an action for a libel against the editor of a newspaper, in publishing certain evidence given before a coroner, a witness, who was the coroner's clerk, being asked whether he had not furnished the report to the editor, answered one or two questions upon the subject, but, upon being pressed with further questions, he objected to answer, as he might subject himself to an indictment; *Abbott, C. J.* however, said, "You might have refused to answer at all, but having partially answered, you are now bound to give the whole truth." *Moody & M.* 47. If, on the other hand, the witness, in answer to such questions, deny the offence imputed to him, such denial is conclusive, and you cannot afterwards call witnesses or offer other evidence to contradict him. 2 *Stark.* 149, *et seq.* 2 *Camp.* 637. But if he have been convicted of the crime, *you may give in evidence the record of his conviction; or if he have not, or indeed whether he has been convicted or not, you may call witnesses to speak as to his general character, although not as to any particular offence of which he may be guilty. 2 *Hawk. c.* 46, s. 20. 4 *St. Tr.* 693. 2 *Stark.* 149. and see 4 *Car. & P.* 392. 5 *Id.* 468. When general evidence is thus given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross examination. 1 *Holt*, 541.

From their Veracity.] The character of a witness for habitual veracity, is an essential ingredient in his credibility: a man who is capable of uttering a deliberate falsehood, is in most cases capable of doing so under the solemn sanction of an oath. If therefore it appears that he has formerly said or written contrary to that which he has now sworn, (unless his motive for having done so be very satisfactorily accounted for,) his evidence should not have much weight with a jury; and if he have formerly sworn the contrary, that fact, if not satisfactorily explained and accounted for, is almost conclusive against his credibility. See 11 *East*, 309. 5 *M. & S.* 44. *ante*, p. 478. In strictness you cannot ask a witness if at a former trial he swore differently from what he is now swearing; but you should give in evidence the record of the former trial, and then prove the evidence he gave at it, as directed *ante*, p. 392. See 1 *Camp.* 461. So, if his former declaration was in writing, it is irregular to question him as to the contents of it; you should

produce it, ask him if it be his handwriting, and then give it in evidence. See 2 Esp. 691. 2 Brod. & B. 286. 288. 292. But if it were a mere parol declaration, you may either cross-examine him on the subject of it, or you may call another witness to prove it. But before you call another witness to prove it, you must first cross-examine the witness as to his having made such declaration. 2 Brod. & B. 299. 311, naming to him the persons to whom, or on the occasion on which he made it, together with time, place, &c., so as to call his attention to the occurrence, if it ever did take place. Moody & M. 473. A witness, however, cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. 7 East, 108: So, if the declaration as to which the witness is cross-examined, were not a statement of a fact, but merely of the witness's opinion or judgment, though relating to the matter in issue, if he deny having made such a declaration, you cannot afterwards call another witness to contradict him. 5 Car. & P. 390. 385.

A consideration of the probability of the fact, also, may aid us in forming a judgment of the credit that should be given to a witness for veracity. If he tell us of a fact having occurred, which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge should be indisputable, *to induce us to believe it; but if, on the contrary, the fact stated by him be very likely to have happened, we may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, &c. The strength of the evidence should always be in proportion to the improbability of the fact to be established by it.

From their being sworn to speak the truth.] No credit whatever shall be given to the testimony of a witness, examined *viva voce* in a court of common law in this country, unless he have previously been sworn to speak the truth. Even a peer, who in a court of equity is allowed to give in his answer without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness. W. Jon. 153—155. Cro. Car. 64. 2 Mod. 99. 2 Salk. 513. 1 P. Wms. 146. The form of the oath varies according to the religion or country of the witness. See Cowp. 382. Christians are sworn on the New Testament; Jews, on the Old Testament; Mahometans, on the Koran; and persons of other religions, according to the form prescribed for that purpose by the religion they profess. Bul. N. P. 292. Christians are sworn with their hats off; Jews with their hats on. Even among the different sects of Christians, there may be a variance in the manner of taking the oath;

a Scotch Covenanter for instance, instead of kissing the book, as is done by other sects of Christians, holds up his hand, whilst the book lies open before him. 1 Leach, 819. Cowp. 882, and see Peake, 23. 155. Each witness swears in the particular form prescribed by his religion; the only general rule that can be laid down upon the subject is, that the oath be such as the witness deems obligatory on his conscience. And the witness may be asked if he considers himself bound, by the form of oath he has taken, or is about to take, to speak the truth: if he answer in the affirmative, then his answer is conclusive; and he cannot afterwards be asked whether he considers any other form of oath more obligatory. 2 Brod. & B. 284. He may be asked also if he believe in the being of a Deity, and in a future state of rewards and punishments; but he cannot be questioned as to the particular tenets of his religion. See Peake, 11. 1 Leach, 482. These, and the like questions, should in strictness be asked before the witness is sworn; at least it is the more correct and proper way. 2 Brod. & B. 284. And if it appear that he has no religious belief, which he deems binding upon his conscience to speak the truth upon oath, he cannot be a witness. Bul. N. P. 292.

The only exception to what is above stated, as to the necessity of the witness being sworn, is in the case of quakers, Moravians, and Separatists. A Quaker is allowed, by stat. 7 & 8 W. 3, c. 34, to make an affirmation instead of an oath; and the statute assigns the same penalties to a false affirmation as to perjury. And indeed they may now make an affirmation instead of an oath in all cases. 3 & 4 W. 4, c. 49. So may Moravians. 9 G. 4. c. 32. 3 & 4 W. 4, c. 49. So may that class of dissenters called Separatists, 3 & 4 W. 4. c. 82. The form of an affirmation for a Quaker or Moravian, is thus:—"I, A. B., being [one of the people called Quakers," or, "one of the persuasion *of the people called Quakers," or, "one of the united brethren called Moravians," as the case may be,] do solemnly, sincerely, and truly declare and affirm," &c. The affirmation of the separatists is thus:—"I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, affirm and declare," &c.

The dying declarations of a person, although made under circumstances nearly equivalent to the moral obligation of an oath, and although evidence to a certain extent in criminal cases, (see Arch. Pr. Qu. Sem. 152,) is not in general, evidence in a civil action. And therefore, in ejectment, where the lessor of the plaintiff tendered in evidence the

dying declarations of an old servant of the family as to his relationship, to the party last seised, the court held that it was not evidence. 4 B. & Ald. 53. But where dying declarations formed part of the *res gesta*, they were holden to be admissible; 6 East, 188; and where the attesting witness to a deed made a dying declaration that it was a forgery, it was allowed to be given in evidence, on the ground that if the witness had lived, and had been examined in proof of the deed, he might be cross-examined as to his previous declaration. 6 East, 195, cit. 3 Burr. 1244. But these are the only exceptions. Per Abbott, C. J. 4 B. & Ald. 54.

SECT. IV.

Examination of Witnesses.

The examination of witnesses, in ordinary cases, is *viva voce* in court. And if the witness be a foreigner, not understanding or speaking English, he is examined through the medium of an interpreter, sworn for the occasion. So, where a witness is deaf and dumb, he may be examined through the medium of a sworn interpreter, who understands his signs; *R. v. Pollock*, MS. 1814; or if he can write, it will be more satisfactory that the questions should be reduced to writing and shewn to him, and that he should give his answers in writing also. 3 Car. & P. 127.

Upon the Voire Dire.] When a witness appears to give evidence, the first thing the opposing counsel has to consider is, whether he is a competent witness. And in all cases of incompetency from interest (see ante, p. 454,) or from relation to a party to the suit (see ante, p. 470,) counsel are allowed to ascertain the fact, by an examination of the witness himself, upon the *voire dire*, before he is examined in the cause. It is technically termed an examination on the *voire dire* (*veritatem dicere*;) because the witness, instead of being sworn in the cause, is merely sworn that he shall true answers make to such questions as shall be demanded of him; and if, upon examination, he appear to be incompetent, he is not sworn or examined in the cause; but if competent, he is then sworn in the cause and examined in the ordinary way. But although the *examination in such a case should in strictness be upon the *voire dire*, and in prudence it is desirable in most cases that it should be so, yet in practice you are allowed to put questions to a witness with relation to his competency, after he is sworn in the action, and even during the cross-examination; and indeed if the incompetency

of a witness is discovered at any time during the trial, his evidence will be struck out. 1 T. R. 720.

But in case of incompetency from want of religion (see ante, p. 452,) it is the better and more approved method to question the witness upon the subject before he is sworn at all. (Ante, p. 480.) And in case of incompetency from infamy, we have seen (ante, p. 454) that the only mode of making the objection is, by producing the record of the conviction, or an examined copy of it, and not by any examination of the witness upon the subject.

In an examination on the *voire dire*, there is this anomaly, that the witness may be required to give parol evidence of the contents of a written instrument, although it do not appear to have been destroyed or lost, and no notice have been given to produce it; and on the other hand, if upon such an examination an apparent incompetency be made out, the party who called the witness may re-examine him, to shew that by a written instrument his competency has been restored, without producing or otherwise proving it. This is allowed from necessity: for the party objecting to the witness is not supposed to know that such witness will be produced against him; and the party who calls the witness may not know that the particular objection will be made to him. A familiar instance of this is, where a witness, by being a bankrupt, would be incompetent, unless he had also obtained his certificate, then the party seeking to establish his incompetency is allowed to ask him whether he has been a bankrupt, although in ordinary cases the proper mode of proving this would be by producing the fiat and adjudication; and if the answer be in the affirmative, the party calling him may ask him if he have not obtained his certificate, without producing it. (See ante, p. 459.) And where a bankrupt stated on the *voire dire* that he had obtained his certificate and released to his assignees, Park J. held him competent, without production of either certificate or release. 1 Car. & P. 334, ante, p. 459. But where a witness, upon examination on the *voire dire*, acknowledged that he had entered into an agreement the effect of which was to render him incompetent, and the agreement (which was in writing) was thereupon produced by him: the party who called him wished the instrument to be read; and Abbott, C. J. held, that as the witness had produced the instrument upon which the objection to his competency rested, it should be read. 2 Stark. R. 433.

As to the incompetency of witnesses, see ante, p. 542; from want of discretion, ante, p. 452; from want of religion, ante, p. 452; from infamy, ante, p. 453; from interest, ante, p. 454; from being parties to the suit, ante, p. 470; from relation to the parties, ante, p. 473.

Examination.] In the examination of a witness, the first rule to be

attended to is, that the questions be relative to the matter in issue. If this be not attended to, the examination will be rambling and uncertain, and likely to confuse and perplex the jury, from the very circumstance of its comprising irrelevant matter. Besides, the court have a right to prevent any questions being put, which do not tend to the proof of the issue. As to what must be proved, and what may be rejected as surplusage, see ante, p. 323, &c.

Secondly, no leading question, or, in other words, no question which in itself suggests the answer required to it, should be put, in the direct examination of a witness, upon any point at all material to the issue. You will be allowed to lead him upon immaterial matter, which is merely introductory; but as soon as you reach the material part of the examination, all leading questions must be carefully avoided. There are instances, however, in which this cannot be avoided. For instance, where a witness, upon his cross-examination, being asked if he made use of certain words to J. S., denies it, and J. S. is afterwards called to contradict him, the very words may be repeated to J. S., and he may be asked whether the former witness did not make use of them to him; 3 Stark. 7. and see 1 Camp. 43; for if you merely asked J. S. what the witness had said to him, it might be impossible ever to come to a direct contradiction. So, if you wish a witness to identify a particular person present in court, you may point the party out to him, and ask him if that be not the person. 2 Stark. 128. And formerly, when a witness shewed himself decidedly averse to the party calling him, the judge, upon application, always allowed the party to examine him after the manner of a cross-examination, asking leading questions, &c.; and in the case of an issue out of Chancery, where the defendant, by an order of that court, was examined as a witness for the plaintiff, Best, C. J. held, that as the witness stood in a situation which of necessity made him adverse to the plaintiff, the counsel for the plaintiff might cross examine him as a matter of right. Ry. & M. 126. And in a similar case, where such a cross-examination of an adverse witness was objected to, but allowed, Abbott, C. J. said, I mean to decide this and no further, that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice. Ry. & M. 127. However, at present the judges are not generally inclined to allow of such indulgence in the examination of adverse witnesses; and the propriety of it seems to be doubted.

Thirdly, a witness should not be examined, nor should he be allowed to give evidence, as to any matter which he does not know of his own knowledge; except in cases where hearsay evidence is receivable;

see ante, p. 450; and except also in a matter of science, when a person intimately acquainted with it may be examined as to his opinion of the probable result or consequence from certain facts already proved by others. *See ante*, p. 449.

The witness is allowed to refresh his memory, by a reference to any memorandum or entry, made by himself, at a time when the transaction was fresh in his recollection. 8 *East*, 289. And where an agent, who had given a receipt for money, afterwards became *blind, the receipt, though unstamped, was allowed to be read to him in court, for the purpose of refreshing his memory. 3 *Stark. R.* 3. Also, where, upon the examination of a captain of a ship, the log book was laid before him for the purpose of refreshing his recollection; and being asked if he had written it himself, he answered that he had not, but that from time to time he examined the entries in it whilst the occurrences therein mentioned were recent and fresh in his recollection, and that he always found the entries to be correct: Lord Ellenborough, C. J. held this to be the same, for the purpose of refreshing the witness's memory, as if the entries had been written by himself. 2 *Camp.* 112. So, where a clerk to a tradesman entered the transactions in trade daily in the waste book from his own knowledge, and the tradesman copied the entries daily into the ledger, in the presence of the clerk, who checked them as they were copied: in an action brought by the tradesman for goods sold and delivered, it was holden that the clerk might use the entries in the ledger, for the purpose of refreshing his memory, although the waste book was not produced nor its absence accounted for, the entries in the ledger being in the nature of entries made by the clerk himself. 2 *Ad. & E.* 341. This use of such a memorandum, however, must be understood as allowed merely to aid the memory of the witness; for if he have no recollection of the fact stated in it, except from his finding it entered there, he cannot be allowed to give evidence of it. 3 *T. R.* 749. *Id.* 754, *cit.* But where an entry in a book stated a payment of a sum of 20*l.* to J. S., and was signed by J. S. with his initials, and upon J. S. appearing as a witness to prove the receipt of this 20*l.*, and the book being put into his hands for the purpose of refreshing his memory, he said, "I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money;" the court held this to be sufficient; and Bayley, J. remarked that where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says that he is therefore sure that he saw the party execute the deed, that is a sufficient proof of the execution, though the witness add that he has no recollection of the fact. 8 *B. & C.* 14. But where a witness sought to

refresh his memory, not from the memorandum which he had originally made, but by a copy of it made by himself six months afterwards ; Best, C. J. held that it could not legally be done, that for such a purpose he could only look at the original memorandum made near the time. 3 Car. & P. 196. Where counsel puts a paper into the witness's hands, for the purpose of refreshing his memory, the opposite counsel has a right to see it, and may cross-examine or re-examine upon it. 2 Car. & P. 603. 1 Id. 582. So, where a witness looked at an entry in a book, for the purpose of refreshing his memory as to the numbers of certain bank-notes, it was holden that the counsel for the opposite party might cross-examine him upon the whole of the entry. 2 Car. & P. 332, 325 ; and see 6 Id. 280.

If a witness give evidence contrary to what the party calling him expects, the latter is not allowed to produce evidence to destroy the credit of such witness, so as to shew generally that he is not to be believed upon oath ; but although he is not allowed thus to discredit his witness by general evidence, he is still at liberty to make out his case by other witnesses. Bul. N. P. 297. 2 Camp. 555. Therefore where in support of a plea of non-joinder, in order to prove a partnership between the defendant and S. B., the defendant called S. B. as a witness, who, to his surprise, proved that no partnership had existed ; and the defendant thereupon put in evidence an answer of S. B. to a bill in equity, in which he swore to the existence of the partnership, and he also called witnesses to prove that S. B. was a partner ; this evidence being objected to on the ground that the defendant was not at liberty to give evidence to contradict his own witness, the court held that the answer to the bill in equity was wrongly received in evidence, because it had the effect of throwing general discredit upon the testimony of the witness ; but that the other witnesses were properly received to prove the partnership, for the testimony of the first witness being adverse did not preclude the defendant from proving his case by other evidence. 3 B. & C. 746. And where a witness gives evidence as to two facts, one for and the other against the party calling him, the party may call other witnesses to contradict him as to the latter fact, without repudiating his testimony as to the former. And, therefore, where, in an action for a false return to a fi. fa., the plaintiff called the sheriff's officer to prove the warrant, and he, upon cross-examination, proved that there were no goods upon which the sheriff could have levied : the plaintiff offered then to prove by other witness that there were goods sufficient within the bailiwick ; but the judge held that he could not do so without repudiating the whole of the evidence of the officer, which in that case must be struck out altogether, and the plaintiff therefore

submitted to be nonsuit ; the court, however, afterwards, upon application, set aside the nonsuit, holding that the plaintiff's contradicting the witness upon one point was not a repudiation of his evidence altogether, but it was for the jury to say, under the circumstances of the case, what credit should be given to the witness on the one point and on the other. 8 Bing. 57.

At the commencement of the trial, or at any time during its progress, the judge, upon application, will order the witnesses on either or both sides out of court, in order that they may not hear the address of counsel, and that none of them may be examined in the presence or hearing of others who are to be examined or cross-examined after them. The attorneys of the respective parties, Ry. & M. 430, and any witnesses who are to depose to matter of opinion, and not to facts, are never included in this order. If the witness do not withdraw when ordered, or if he afterwards come into court and be present during the examination of some other witness, in the Exchequer it seems that it is a peremptory rule that he cannot be admitted to give evidence ; 9 Price, 4 ; but in the other courts it is discretionary with the judge whether he will allow him to be examined or not. 6 Bing. 683. 1 Moody & M. 329.

Cross-examination.] A witness attending upon a *subpoena duces *locum* and called merely for the purpose of producing a deed or other paper writing, need not be sworn, if the party by whom he is called do not wish to examine him ; 1 Ad. & E. 48. 1 Moody & M. 514. 4 Car. & P. 335 ; and if not sworn, the other party have no right to cross-examine him. On the other hand, if a witness be called and sworn, although the party who calls him do not examine him, yet the opposite party has a right to cross-examine him, if he will. 1 Esp. 357. 2 Stark. R. 472. But where the plaintiffs counsel, intending to call Captain Francis Stewart, called Captain Stewart, and a Captain Hugh Stewart appeared and was sworn, but after a few questions the mistake was found out ; the defendant's counsel then claimed the right to cross-examine him ; but Lord Tenterden, C. J. held, that as he had been called by mistake, he could not be cross-examined. 3 Car. & P. 16.

Upon cross-examination, the witness may be asked leading questions. And the questions need not be confined to the subject of the examination ; the party cross-examining may question the witness, not only as to all matters relevant to the issue, but as to collateral matter also, for the purpose of trying his credit. But if a question be put to him thus upon a subject which has no relevancy to the matter in issue, you must be satisfied with the witness's answer ; you cannot afterwards

call any witness to contradict him. 7 East, 109. 2 Camp: 687. and see 2 Stark. R. 243, 244. If the question be relevant, it is otherwise.

The purpose of a cross-examination is either to impugn the credit of the witness, or to get him to explain or give a colour to what he has already stated in his examination in chief; so as to render it less unfavourable to the party cross-examining. You may cross-examine him, for the purpose of shewing that he has no great respect for the moral obligation of the oath he has taken; see ante, p. 480; or to shew that, however he may design to speak the truth, his means of knowledge upon the subject of his evidence were so solicited, he may possibly have been deceived in what he has asserted in his examination in chief; see ante, p. 477; or to shew that he is interested in the event of the cause although his interest fall short of that which would render him incompetent as a witness; see ante, p. 477; or to shew that he has been punished for offences, or otherwise so degraded, that no dependence can with safety be placed upon his testimony; see ante, p. 477; or to impeach his veracity, by shewing that he has at other times made declarations, by parol or in writing, or done acts, inconsistent with the evidence he has given upon his examination. And in this latter case you will not be allowed to impeach the testimony of the witness, by proving his former declarations or acts to the contrary, unless you first cross-examine him particularly as to his having made such declarations or done such acts; 2 Brod. & B. 311. (The Queen's case.) Even if a witness, upon his examination as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he have in cross-examination *questioned the witness as to such declaration; for the fact may have occurred, and the witness may have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination: 2 Brod. & B. 299. If a witness be asked whether he made a certain representation, the opposite counsel may interpose, and ask him whether the representation in question were by parol or in writing; for if the latter, the writing should be produced. 2 Brod. & B. 292. If the declaration were by parol, it is not sufficient, in cross-examining the witness upon the subject, to ask him whether he has ever made such a statement, but you must also ask him as to time, place, and person involved in the supposed contradiction, so as to call his attention more particularly to the circumstance. Moody & M. 478. If he admit having made the former declaration, of course no further evidence of it is necessary, nor will it be received. Even

where a witness merely said that he had no recollection, one way or the other, of having made such declaration, without expressly denying it, and a witness was afterwards called, to prove that he had made it: Tindal, C. J. refused to receive the evidence, saying that he had never heard such evidence in contradiction, except where the witness had expressly denied the declaration. Moody and R. 20. But if he expressly deny it, the opposite counsel may afterwards, as part of his evidence, call as a witness the person to whom the former witness made the declaration, may repeat the very words used by him in his question to the former witness, and ask him whether such witness did not make use of those expressions to him. 3 Stark. 7. and see ante, p. 479. If however the former declaration were in writing, as for instance, in a letter, you cannot state to the witness the contents of the letter, and then ask him if he ever wrote such a letter; but you should shew him the letter, ask him if it be of his handwriting, and if he admit it, then give the letter in evidence. Or you may shew him a part of the letter, and ask him if he wrote that part; but if he do not admit that he wrote it, you cannot then proceed to cross-examine him as to the contents of the letter; 2 Brod. & B. 286; nor, even if he admit it to be of his handwriting, can you question him whether statements, such as you suggest to him, are contained in the letter, but the entire letter must be given in evidence. Id. 288. If upon shewing him the letter, he admit it to be of his handwriting, the ordinary course is to have the letter read as part of your evidence after you have opened your case. But if it become necessary to have the letter read, in order to found certain questions with relation to the contents of the letter, to be propounded to the witness, the court upon application will allow the letter to be read at the time of the cross-examination, subject of course to the consequences of the letter's being considered as a part of your evidence. 2 Brod. & B. 288. But where a witness was asked upon the *voire dire*, whether he was not liable to pay the costs of the action, and he answered in the negative, Parke, B. held that the counsel, who was examining him, might put into his hands a letter which he had written, and might then again ask him whether he was not liable to the attorney, without having the letter read, or making it any part of his evidence. 6 Car. & P. 717.

*Besides this mode of impeaching the credit of a witness, by a cross-examination of himself, or by calling witnesses to contradict him, his character may also be impugned by calling witnesses acquainted with it, who may be asked generally whether, from what they know of his character, they would believe him upon his oath. 4 Esp. 102, and see ante, p. 479. And in a prosecution for a highway robbery, where in

opening the case it was stated that particular facts would be proved by A. and B., J. Parke, J. allowed the prisoner's counsel, both before and after A. and B. were examined, to ask the other witnesses for the prosecution whether A. and B. were not persons of very bad character: 5 Car. & P. 600.

Re-examination.] If a witness be cross-examined, the party who called him has a right to re-examine him with respect to any statements made by him in his cross-examination, in order that he may explain them where necessary and practicable. And the questions put to the witness in re-examination, must be confined strictly to his statements in cross-examination, or to matter immediately arising out of them; no question can be put to him relative to new matter, not arising out of the cross-examination, and which ought, if at all, to have been asked during his direct examination, without the leave of the judge, and without giving the opposite counsel liberty to cross-examine upon it, if he will. In *The Queen's Case*, the judges, in answer to a question put to them, stated that if a witness, upon his cross-examination, admit to his having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel in re-examining the witness is confined to such questions as may elicit the meaning of the expressions and the motives of the witness for using them; but where a witness deposes to certain expressions being used by a party to the cause, the counsel for that party is entitled to cross-examine, or re-examine the witness as to the whole of the conversation in which the expressions occurred, because in such a case the expressions are given in evidence as an admission of the party, and the whole of the admission must be taken together. 2 Brod. & B. 294.

Witnesses in reply.] If the defendant set up any defence, and give evidence in proof of it, the plaintiff may then call witnesses in reply. Their testimony however must be confined strictly to the defence, and the witnesses called in support of it: the plaintiff will not be allowed to wander out of it, and give any evidence in further support of his original case.

CONCLUSION.

THE following recapitulation of the defects which usually occur in pleading, and of the several modes of taking advantage of them, will, it is presumed, be found useful. As far as respects the younger part of the profession, its utility is sufficiently obvious; and even the more experienced pleader will probably find it calculated to give him additional facility in detecting errors, which through the hurry of business might otherwise escape his notice. The novelty of the attempt, may perhaps operate to its disadvantage in the estimation of some person; but if its utility be acknowledged, I shall be satisfied.

Where two or more modes of taking advantage of a defect are mentioned, if one be more usual in practice, or more advisable, than the others, it is printed in italics. References to the body of the work are added, where the reader will find the subject of these defects respectively treated of in detail.

CHAPTER I.

DECLARATION.

TITLE.

1. Does the declaration, by its title, relate to a time before the cause of action accrued? 74—77. Plea in abatement, 77; *Nonsuit*, unless it appear that the writ or process was sued out after the accruing of the cause of action, 77. Or, if the defect appear upon the face of the declaration, the defendant may *demur*, 77; move in arrest of judgment; or bring a writ of error, 77. *Qu.*
2. Is the action commenced within the time limited for that purpose by statute? 21—34. If not: plea of the statute of limitations, 200. Or, in ejectment, if the right of entry accrued to the lessor of the plaintiff more than twenty years before the day of the demise laid in the declaration.—*Nonsuit*.

VENUE.

1. Is venue omitted? 80. *Demurrer*, 80. Plea in abatement, 80. 293.
2. Is a wrong venue laid in local actions? 77—80. Nonsuit, 80, unless the venue have been changed by the order of the court or a judge, 80.—Or, if it appear upon face of the declaration; *Demurer*, 80, 106.

PARTIES.

1. Is the plaintiff the person legally entitled to the action? 35—47. If not: Nonsuit. Or, if it appear upon the face of the declaration; *Demurrer*; Arrest of judgment; Error.
2. Is the plaintiff misnamed, in his Christian name, surname, name of dignity, or name of office? 288. Formerly plea of the misnomer in abatement, 47. 80. 100; but defendant can now only oblige the plaintiff to amend the declaration, and pay the costs of the application, 288.
3. In debt on bond, &c., and in action on a joint covenant, is the name of any of the obligees or covenantees omitted as plaintiff, and the death of such person not averred in the declaration? 49. 54.—Plea in abatement, 54. 287; set out the deed on oyer and demur, 54; Nonsuit, id. Or, if it appear upon the face of the declaration that there is an obligee, &c. living, who is not named; *Demurrer*, without praying oyer, 54; Arrest of judgment; Error.
4. In an action on a covenant which is joint and several, is the action brought by more than one of the covenantees, and not by all; Plea in abatement; Set out the deed on oyer and demur; Nonsuit. Or if it appear upon the face of the declaration that the covenantees, &c. not named are living; *Demurrer* without praying oyer; Arrest of judgment; Error.
5. In actions upon contracts not under seal, is the action brought by some only of several who ought to join, the death of the others not being averred in the declaration? 50. 55. Plea in abatement, 55; Nonsuit, id. Or if it appear upon the face of the declaration; *Demurrer*; Arrest of judgment; Error, id.
6. In actions for a tort, such as trespass, case, &c., is the action brought by some only of several who ought to join? 51. 55. Plea in abatement, 55.
7. In actions by executors, is the action brought by all the executors named in the will? 53. 55. If not:—Plea in abatement.
8. Is an action, which should be brought by husband and wife, brought by the wife alone? 37—42. Plea of coverture in abate-

PARTIES—(continued.)

- ment, 286, 298; or the defendant may take advantage of it, as in other cases of nonjoinder above-mentioned, Qu. 3—6.
9. Is an action which should be brought by husband and wife, brought *by husband alone? 37—42. Advantage may be had of it as in other cases of nonjoinder above mentioned. Qu. 3—6.
10. When a declaration against one of two defendants states the other to be outlawed, does the declaration by its title relate to a time before the judgment of outlawry? 76, 81. Demurrer; and *semb.* Nonsuit; Arrest of judgment; Error.
11. Are persons joined as plaintiffs, who should not? 47—53. Plea in abatement, 287, 55; Nonsuit 55. Or if it appear upon the face of the declaration; Demurrer; Motion in arrest of judgment; Error. 55.
12. Where the husband should sue alone, is the action brought by husband and wife? 37—42. Plea in abatement; Nonsuit. Or if it appear upon the face of the declaration; Demurrer; Motion in arrest of judgment; Error. 42, 55.
13. Is there any variance between the declaration and the writ, in the name of the plaintiff? 47. Move to set aside the proceedings. *id.*
14. Is the declaration *in auter droit* or *qui tam*, upon process in plaintiff's own right? or is the declaration in his own right, upon process in *auter droit*? 81. Probably the court would set aside the proceedings; and in bailable actions it is probable it would be holden that the bail would be thereby discharged.
15. Is the writ at the suit of one, and the declaration at the suit of two, or *vice versa*? 81. Move to set aside the proceedings for irregularity, *id.*
16. Was the sole plaintiff, or one of several plaintiffs, dead at the time of commencing the action? 288. Plea in abatement.
17. Was there never such a person in existence, as the plaintiff, or as one of the plaintiffs? 287. Plea in abatement, *id.*
18. Is the plaintiff attainted of treason, felony, or *præmunire*? 4, 284. Plea in abatement; or plea in bar, if the cause of action be forfeited by the attainer, 284, 285.
19. Is a judgment of outlawry in a force against the plaintiff, or one of the plaintiffs? 3, 4, 284. Plea in abatement, 284; or plea in bar, if the cause of action be forfeited by the outlawry, *id.*
20. Is the plaintiff an alien enemy? 3, 285. Plea in abatement, or plea in bar, 285.
21. In actions real or mixed, (unless brought as tenant by *elegit*.) is the plaintiff an alien amy? 3, 285. Plea in abatement, 285.

PARTIES—(continued.)

22. Is a plaintiff, who sues by attorney, an infant? 286. Plea in abatement, *id.*
23. Is the action brought against the person legally liable? 55—65. If not:—Nonsuit. Or if it appear upon the face of the declaration; Demurrer; Arrest of judgment; Error.
24. *Is the defendant misnamed, in his Christian name, surname, name of dignity, or name of office? 291. Formerly plea in abatement, *id.*; but now, he can only oblige the plaintiff to amend, and pay the costs of the application, 291.
25. Is an action *ex contractu* brought against some only of several who ought to be jointly sued? 65—69. Plea in abatement, 69, 70. 289, 290.
26. Is debt on a joint and several bond, brought against more than one, and not against all the obligees? 67, 70. Plea in abatement, 70. Or if it appear upon the face of the declaration that another obligor not named, also sealed the deed, and that he is alive, the court will arrest the judgment, or the defendant may plead the nonjoinder in abatement, at his option; but it is no ground of nonsuit, on the plea of *non est factum*, *id.*
27. In actions *ex quasi contractu*, is the action brought against some only of several persons who should have been jointly sued? 67, 70. Plea in abatement, 70.
28. In actions *ex delicto*, nonjoinder of defendants cannot be taken advantage of, by plea in abatement or otherwise, 70; unless it be brought against a tenant in common, joint-tenant, or corparcener, for any thing respecting the land holden in common, &c., in which case the nonjoinder may be pleaded in abatement, 70. 65, 66.
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TITLE OR CAUSE OF ACTION.

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2. Where the right of action depends upon plaintiff's performance of a condition precedent, is mention of the condition precedent omitted in the declaration? 84—90. Nonsuit. Or if the action be upon a deed, set out the deed upon oyer, and demur generally.
3. Where a condition precedent is stated, is there an averment of its being performed? 84—90. If not: Demurrer. Error after judgment by default. But said to be cured by verdict. 164. 2 Bur. 899. 1 Saund. 288. b. but see 1 T. R. 638, and see ante, p. 150—153.
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23. *Is the matter stated scandalous or impertinent ? 113. Move to have it referred to the master, &c. *id.*
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25. Is there a variance between the statement in the declaration, and a record by which it is to be proved ? 117, 118. 336—340. Nonsuit.
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28. Is a title by prescription alleged truly ? 126—129. 344. If not : Nonsuit, 344.
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*CHAPTER II.

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3. After craving oyer, does the defendant in his plea set forth a part only of the deed, or does he misrecite it? 170. Sign judgment as for want of a plea; 170; or pray in the replication that the deed may be enrolled, procure it to be truly enrolled, and then demur generally. 170:
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2. Is the colour given, matter doubtful to the *lay gents*? 196. If not: *Special demurrer.* Demurrer, *Semb.*
3. Does the matter of colour appear to have continuance, though it want effect? 196, 197. If not: Special demurrer.
4. Is the colour such as, if effectual, would maintain an action such as that brought? 197. If not: *Special demurrer.* Demurrer, *Semb.*

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5. Is a defective or insufficient title stated? *Demurrer*. Error.
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CONFESSION AND AVOIDANCE,

1. Where the defendants sets up a right to an easement &c. does the plea state specifically the defendant's title, or an enjoyment of the right for the time limited by statute? 200, 201. 227. If not: *Special demurrer*. See 222.
2. Does the plea confess the cause of action stated in the declaration? 202. If not: *Special demurrer*, 202.
3. Is the matter of avoidance a legal and sufficient defence to the action? If not: *Demurrer*; Error. Or, if the merits be very clear, move for judgment *non obstante veredicto*. See 2 Arch. Pr. C. B. 270.

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1. Is the matter pleaded an estoppel? 203. 210. If not: *Demurrer*; Error.
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2. Is the matter pleaded an answer to the whole declaration? *172. 300. If not: if the plea commence as an answer to the whole, and be an answer to part only; *Demurrer*, 173. But if the plea commence as an answer to part only, and be an answer to that part or even to the whole, take judgment by *nil dicit* for the part which the plea in its commencement does not profess to answer, 173; for if you demur or plead over, the whole action is discontinued, 173
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4. Does the plea vary from the declaration in time, where the time is not essential to the defence? 213. *Special demurrer*, 213.

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10. Where the plea varies from the declaration in place, and the defence is local, does the plea conclude with a special traverse of the place in the declaration ? 214, 215. If not : Special demurrer.
11. Where the defence is local, is the county, and the parish or place if material, stated truly in the plea ? 224. If not : Verdict for plaintiff.
12. Does the plea agree with the declaration in other respects ? 215. If not : if the plea be in fact no answer to the declaration, the plaintiff may demur : or he may treat the plea as a nullity, and sign judgment, 215.
13. Is the matter of plea stated with sufficient certainty ? 216, 222. If not : Special demurrer, 222.
14. Is the matter of defence stated directly and positively, and not merely by way of recital or argument &c. ? 222. If not : Special demurrer, 223.
15. Is any part of the matter of defence stated, repugnant or insensible ? 224. Special demurrer, 224.
16. Where a contract is pleaded, is it truly stated ? 225. 330—336. If not, and it be put in issue by the replication : Verdict for plaintiff.
17. Is a sum, date or other material matter, stated without a *viz.* ? See 121. 113. 101, 102. If stated untruly : Verdict for plaintiff.
18. Is there a variance between a statement in a plea, and a record by which it is to be proved ? 225. 336—340. Verdict for plaintiff.
19. *Where an estate for life or other particular estate is pleaded, does the plea state the commencement of it, 225, and show that

MODE OF STATING THE DEFENCE—(continued.)

- it has continuance ? 122, 123. If not Special demurrer.
20. If seisin of a sole corporation be pleaded, is it alleged that he is seised in his corporate capacity ? 228. If not : demurrer, 227.
21. Is the defendant's title pleaded generally, where it is not merely matter of inducement ? 227, 200, 201. Special demurrer. See 222.
22. Is a custom alleged truly ? 343. If not : Verdict for plaintiff.
23. Is a title by prescription alleged truly ? 228. 126. 344. If not ; Verdict for plaintiff.
24. Is a title alleged by way of prescription, instead of by custom, or *vice versa* ? See 126. 131. Demurrer.
- As to deeds, See ante, p. 495. Qu. 32—36. and see ante, p. 229.
- As to statutes and other records, see ante. p. 495. Qu. 37—42. and see ante, p. 229.
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2. Does a plea of a special traverse, conclude with a verification instead of to the country ? 231. Special demurrer. Semb.
3. Does a plea consisting of title and colour, or a confession and avoidance, conclude to the country, instead of with a verification ? 231, 232. Special demurrer. 231, 232.
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SEVERAL PLEAS.

1. Where several pleas are pleaded without a rule to plead several matters, does any one of them go to the whole declaration, or any two of them go to the same part of it ? 234—239. Special demurrer, 235. Or you may treat the pleas as a nullity, and sign judgment, 239.

DEFECTS AIDED.

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3. Is the plea bad in part ? 241.
4. Where two or more join in the same plea, is it insufficient as to any of them ? 241.

*CHAPTER III.

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2. Does it make the day, place or other circumstances attending the fact traversed parcel of the issue? 246. 198. Special demurrer. As to a special traverse, see ante, p. 497, 498. Qu. 1—11.
3. Does the replication assign a breach, when that is requisite? 246. If it do not, or if it assign a bad one: Demurrer; Arrest of judgment; Error. 247. As to a confession and avoidance, see ante, p. 498. Qu. 1—4. And see ante, p. 252. As to a replication of estoppel, see ante, p. 498. Qu. 1—3. And see ante, p. 252.
4. Does the plaintiff reply *de injuria sua propria*, &c. where he should reply specially? 249—251. Demurrer. 251, 252.
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7. Is not only the *absque tali causa* inserted, but a special traverse also? 251. Special demurrer, 251.
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9. Is the matter of the replication triable? 256. If not: Special demurrer; Demurrer.
10. Is it double? 256, see 245. Special demurrer.
11. Is it pleaded with sufficient certainty? 257. If not: Special demurrer.
12. Is it stated directly and positively, and not merely by way of recital or argument? 258. If not: Special demurrer. 258.
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14. Does it depart from the count? 258—261. See 265—268. Demurrer. 261.
15. Is the matter of it true? See ante, 495. Qu. 24, 25. 27—29, 30. 499. Qu. 17, 18.

REPLICATION.

- As to deeds, records, &c. see ante, p. 495. Qu. 32—42. And see ante, p. 500. Qu. 19—25.
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*CHAPTER IV.

REJOINDER, ETC.

The questions in the last chapter are equally applicable to Rejoinders and the subsequent pleadings. It is unnecessary, therefore to repeat them.

*CHAPTER V.

PLEA TO THE JURISDICTION.

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 2. Is it pleaded by attorney, not being a plea of ancient demesne ? 280. Special demurrer ; Demurrer, semb.
 3. Does it shew that another court in England has exclusive jurisdiction of the cause of action ? 280. If not : demurrer.
 4. Is it pleaded without an affidavit to verify it ? 281. Sign judgment as for want of a plea. 281. Or move to set aside the plea. 281.
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6. Does the plea shew that the plaintiff may have a better writ? 302. If not: Demurrer. See 4 T. R. 227.
7. Does the plea conclude in bar, instead of in abatement? 302—304. Special demurrer, and plaintiff shall have final judgment. 302.
8. *Is the conclusion insufficient in form? 303. Special demurrer.
9. Is the plea pleaded without an affidavit to verify it? 304. Sign judgment as for want of a plea. 304. Or move to set aside the plea. id.
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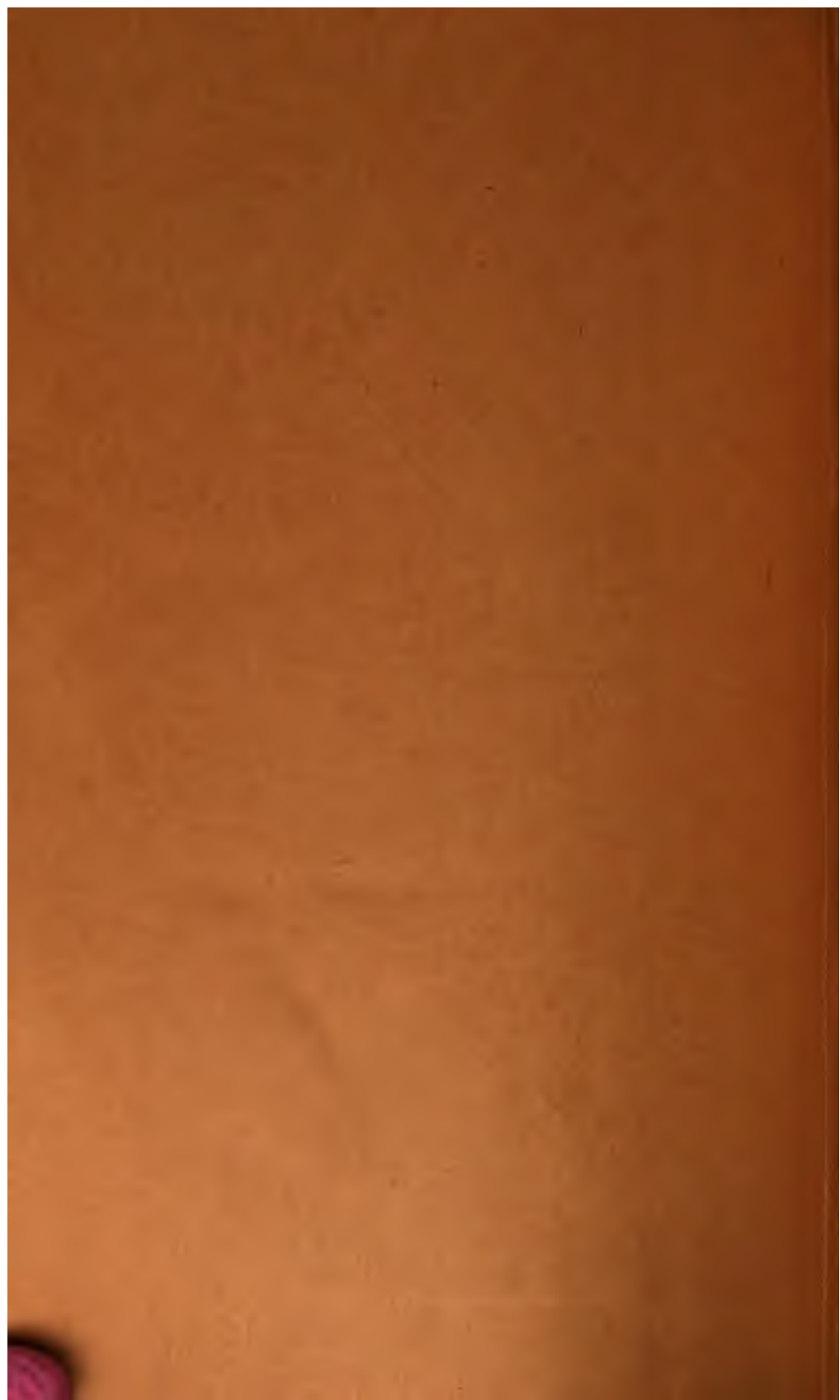
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